

No. 14-419

Title:	Sila Luis, Petitioner v. United States
Docketed:	October 9, 2014
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(13-13719)
Decision Date:	May 1, 2014
Rehearing Denied:	July 9, 2014

Questions Presented

—Date—	——Proceedings and Orders——————————
Oct 7 2014	Petition for a writ of certiorari filed. (Response due November 10, 2014)
Oct 16 2014	Waiver of right of respondent United States to respond filed.
Oct 20 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party received from counsel for the petitioner.
Oct 22 2014	DISTRIBUTED for Conference of November 7, 2014.
Oct 28 2014	Response Requested. (Due November 28, 2014)
Nov 18 2014	Order extending time to file response to petition to and including December 29, 2014.
Nov 26 2014	Brief amici curiae of U.S. Justice Foundation, et al. filed.
Nov 28 2014	Brief amici curiae of Associations of Criminal Defense Attorneys filed.
Dec 23 2014	Order further extending time to file response to petition to and including February 27, 2015.
Feb 18 2015	Order further extending time to file response to petition to and including March 30, 2015.
Mar 30 2015	Brief of respondent United States in opposition filed.
Apr 15 2015	DISTRIBUTED for Conference of May 1, 2015.
Apr 16 2015	Reply of petitioner Sila Luis filed. (Distributed)
May 1 2015	Rescheduled.
May 4 2015	DISTRIBUTED for Conference of May 14, 2015.
May 18 2015	DISTRIBUTED for Conference of May 21, 2015.
May 26 2015	DISTRIBUTED for Conference of May 28, 2015.
Jun 1 2015	DISTRIBUTED for Conference of June 4, 2015.
Jun 8 2015	Petition GRANTED.
Jun 15 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including August 18, 2015.
Jun 15 2015	The time to file respondent's brief on the merits is extended to and including September 30, 2015.
Aug 4 2015	Consent to the filing of amicus curiae briefs in support of either party, or of neither party, received from counsel for the petitioner.
Aug 18 2015	Joint appendix filed. (Statement of costs filed)

Aug 18 2015	Brief of petitioner Sila Luis filed.
Aug 25 2015	Brief amici curiae of United States Justice Foundation, et al. filed.
Aug 25 2015	Brief amici curiae of Cato Institute and the DKT Liberty Project filed.
Aug 25 2015	Brief amici curiae of Association of Criminal Defense Attorneys, et al. filed.
Aug 25 2015	Brief amicus curiae of Americans for Forfeiture Reform filed.
Aug 25 2015	Brief amicus curiae of New York Council of Defense Lawyers filed.
Aug 25 2015	Brief amicus curiae of American Bar Association filed.
Aug 25 2015	Brief amicus curiae of Rutherford Institute filed.
Sep 9 2015	SET FOR ARGUMENT on Tuesday, November 10, 2015
Sep 10 2015	Record requested from the U.S.C.A. 11th Circuit.
Sep 21 2015	Record received from the U.S.D.C. Southern District of Florida is electronic and located on PACER, with the exception of one SEALED Document. (1 envelope)
Sep 22 2015	The record from the U.S.C.A. 11th Circuit is electronic and located on PACER.
Sep 30 2015	Brief of respondent United States filed.
Oct 2 2015	CIRCULATED
Oct 7 2015	Brief amici curiae of National Association of State Legislators, et al. filed. (Distributed)
Oct 9 2015	Motion of Americans for Forfeiture Reform out-of-time for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 29 2015	Reply of petitioner Sila Luis filed. (Distributed)
Oct 30 2015	Motion of Americans for Forfeiture Reform out-of-time for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Nov 10 2015	Argued. For petitioner: Howard Srebnick, Miami, Fla. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C.

14-419
No. _____

OCT 7 - 2014

In The

Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents an opportunity for the Court to resolve a circuit split on a question of fundamental importance to the adversarial system of justice: whether the restraint of *untainted* assets needed to retain counsel of choice in a criminal case violates the Fifth and Sixth Amendments.

Last Term, this Court reaffirmed that *tainted* assets may be restrained pre-trial (and forfeited upon conviction), even when those assets are needed to retain counsel of choice. *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090, 1105 (2014); *accord United States v. Monsanto*, 491 U.S. 600, 616 (1989); *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617, 631 (1989). In rejecting constitutional challenges to pre-trial restraints under 21 U.S.C. § 853, it was significant to this Court that the restrained assets were tainted, *i.e.*, traceable to the alleged criminal conduct. *See, e.g., Kaley*, 134 S. Ct. at 1095 (noting that "no one contests that the assets in question derive from, or were used in committing, the offenses"). Although the Solicitor General and three Justices appeared to agree that the restraint of untainted assets would pose constitutional problems, *see id.* at 1095 n.3; *id.* at 1108 & n.2 (Roberts, C.J., dissenting), the majority opinion in *Kaley* "[did] not opine on the matter." *Kaley*, 134 S. Ct. at 1095 n.3.

The Fourth Circuit has expressly held that "[w]hile *Caplin* [*& Drysdale, Chtd.*] made absolutely clear that there is no Sixth Amendment right for a

QUESTION PRESENTED – Continued

defendant to obtain counsel using tainted funds, [a defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice." *United States v. Farmer*, 274 F.3d 800, 804 (4th Cir. 2001).

Addressing a pretrial restraint under 18 U.S.C. § 1345, the Eleventh Circuit in this case upheld a preliminary injunction that currently restrains all of petitioner's assets, including undisputedly untainted funds needed by her to engage private counsel in her criminal case. Ignoring the Fourth Circuit's holding in *Farmer* and the important and historical distinction between tainted and untainted assets, the Eleventh Circuit interpreted *Kaley*, *Monsanto* and *Caplin & Drysdale, Chtd.* to "foreclose" petitioner's constitutional challenge to the pretrial restraint of legitimate, untainted funds she needs to retain counsel of choice. *United States v. Luis*, No. 13-13719, 564 F. App'x. 493, 494 (11th Cir. 2014).

Given the conflict between the circuits on a constitutional issue significant to criminal defendants, the criminal defense bar and the administration of justice, this petition presents the following question for certiorari review:

> Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioner, Sila Luis, was the defendant in the district court and the appellant in the Eleventh Circuit. Sila Luis is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

The respondent is the United States of America.

Myriam Acevedo and Elsa Ruiz were party defendants in the district court. They did not contest the injunction and did not appeal.

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PETITION FOR WRIT OF CERTIORARI

Sila Luis petitions for a writ of certiorari to review the Eleventh Circuit Court of Appeals' judgment in *United States v. Luis*, No. 13-13719, 564 F. App'x 493 (11th Cir. 2014). App. 1-3.

ORDERS AND OPINIONS OF THE COURTS BELOW

The published opinion of the district court denying petitioner's motion for release of assets to retain counsel of choice and granting the government's motion for a preliminary injunction in the amount of $45 million is reported at *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. June 21, 2013) and reproduced as App. 8-34.

The preliminary injunction entered by the district court on June 24, 2013 is reproduced as App. 4-7.

The opinion of the Eleventh Circuit affirming the district court's orders is reported at *United States v. Luis*, No. 13-13719, 564 F. App'x 493 (11th Cir. 2014) and reproduced as App. 1-3.

The Eleventh Circuit's order denying rehearing and rehearing en banc entered on July 9, 2014 is reproduced as App. 35-36.

JURISDICTION

The district court had subject matter jurisdiction over this civil case pursuant to 28 U.S.C. § 1331, because it involved a complaint for a preliminary injunction filed by the United States under a federal statute, 18 U.S.C. § 1345. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), because it involved an appeal from an order granting a preliminary injunction. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be deprived of property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

18 U.S.C. § 1345 provides:

(a)(1) If a person is –

> **(A)** violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to

defraud the United States or any agency thereof), or 1001 of this title;

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or

(C) committing or about to commit a Federal health care offense;

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court –

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to –

(i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

A. Introduction

Petitioner Sila Luis is an indicted defendant in a criminal case before U.S. District Judge Marcia Cooke in the Southern District of Florida. *United States v. Luis*, Case No. 12-CR-20751-MGC (S.D. Fla. Oct. 3, 2012) (DE3) (available on PACER). Petitioner is charged with health care fraud offenses. She wishes to retain private counsel to defend her in that criminal case. The government estimates a criminal trial lasting 15 days. *Id.* at 18.

In this related, contemporaneous civil action brought by the government under 18 U.S.C. § 1345, U.S. District Judge Paul Huck entered a preliminary injunction prohibiting petitioner from spending any of her own money, including undisputedly *untainted* funds that she needs to retain counsel in the criminal case. App. 4-7. In a published opinion, Judge Huck rejected petitioner's argument that the Constitution prohibits the pretrial restraint of untainted assets needed to pay counsel of choice. *United States v. Luis*, 966 F. Supp. 2d 1321, 1334 (S.D. Fla. June 21, 2013), App. 8-34. In Judge Huck's view, "there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." App. 32.

The Eleventh Circuit affirmed, concluding that this Court's jurisprudence addressing the pretrial restraint and forfeiture of *tainted* assets – *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014), *United States v. Monsanto*, 491 U.S. 600 (1989), and *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989) – foreclosed a constitutional challenge to the restraint of *untainted* assets. *United States v. Luis*, No. 13-13719, 564 F. App'x 493, 494 (11th Cir. 2014). App. 1-3.

Because the injunction prevents petitioner from using her untainted assets to retain counsel, Judge Cooke has stayed the related criminal proceedings (with the government's consent) pending the outcome of this petition.

B. The Statutory Scheme

When the government suspects that a defendant is (or has) engaged in violations of certain federal fraud statutes, including Medicare fraud, 18 U.S.C. § 1345 authorizes the government to initiate a civil action in order to "preserve the defendant's assets until a judgment requiring restitution or forfeiture [can] be obtained." *United States v. DBB, Inc.*, 180 F.3d 1277, 1284 (11th Cir. 1999). To accomplish this goal, section 1345 authorizes the court to enter an order restraining "property, obtained as a result of a [Federal health care offense] or property which is traceable to such violation or property of equivalent value." 18 U.S.C. § 1345(a)(2)(B)(i). As the district court explained: "The 'equivalent value' language means that when some of the assets that were obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead." App. 10.

The statute calls for a "hearing and determination of such an action," but does not set forth the standard of proof. 18 U.S.C. § 1345(b). "A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent [defendant], discovery is governed by the Federal Rules of Criminal Procedure." *Id.* Although the statute does not delimit the duration of the injunction, courts have suggested that the restraint remains in effect until the outcome of the related criminal case. *DBB, Inc.*, 180 F.3d at 1284; *accord United States v. Fang*, 937 F. Supp. 1186, 1202 (D. Md. 1996) ("If within a

reasonable period of time [after an injunction is entered under section 1345], the Government should fail to go forward with criminal charges, the entire fund may be subject to release from the freeze order.").

By contrast, 21 U.S.C. § 853, the criminal forfeiture statute addressed by this Court in *Kaley*, *Monsanto* and *Caplin & Drysdale, Chtd.*, does not explicitly provide for a post-indictment hearing. Nor does it contain language explicitly authorizing the restraint of "property of equivalent value," "substitute assets," or "untainted assets." Nevertheless, the government has urged courts to construe section 853 to permit the restraint of untainted assets, and the circuit courts have divided on that question of statutory construction.[1] The one circuit that has adopted the government's construction of section 853 as authorizing the pretrial restraint of untainted, substitute assets has nevertheless held that the restraint

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[1] The circuit courts are divided as to whether the statutory language of the criminal forfeiture statutes, 21 U.S.C. § 853 and 18 U.S.C. § 1963, which are virtually identical, authorize the pretrial restraint of untainted, substitute assets. *Compare In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990) (statute construed to authorize restraint of substitute assets) *with United States v. Parrett*, 530 F.3d 422, 430-31 (6th Cir. 2008) (statute construed to not authorize restraint of substitute assets); *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998) (same); *United States v. Field*, 62 F.3d 246, 248-49 (8th Cir. 1995) (same); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994) (same); *In re Martin*, 1 F.3d 1351, 1355-56 (3d Cir. 1993) (same); *United States v. Floyd*, 992 F.2d 498, 500-02 (5th Cir. 1993) (same). The Eleventh Circuit has not addressed this statutory construction question.

of a defendant's "wholly legitimate funds to hire the attorney of his choice" would violate the Sixth Amendment, so a hearing is required "to provide an opportunity for [the defendant] to prove that the government seized untainted assets without probable cause and that he needs those same assets to hire counsel." *United States v. Farmer*, 274 F.3d 800, 804-06 (4th Cir. 2001).[2]

C. Course of Proceedings and Relevant Facts

Petitioner was in the health care business, providing nursing and therapy services to home-bound patients. On October 2, 2012, the government filed a Civil Complaint and an Emergency Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction under 18 U.S.C. § 1345, alleging that petitioner defrauded Medicare by paying kickbacks for patient referrals and billing Medicare for unnecessary services. App. 8, 12-13.

The government asked the district court to freeze up to $45 million of petitioner's assets – representing all of the Medicare revenue – "to preserve the status quo and ensure that sufficient assets are available to satisfy any judgment requiring restitution or forfeiture." DE1:8, 17; DE4:2. In support, the government

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[2] In *Farmer*, 274 F.3d at 801, the government invoked 18 U.S.C. § 982 as the statutory authority for the seizures of the defendant's assets. 18 U.S.C. § 982(b)(1) provides that forfeitures and seizures are governed by the procedures set forth in 21 U.S.C. § 853.

filed a sealed declaration from an FBI agent summarizing unsworn hearsay information from unidentified confidential informants. App. 12-14.

Without notice to petitioner or an opportunity to be heard, Judge Huck entered an ex parte Temporary Restraining Order ("ex parte TRO") prohibiting petitioner from disposing of any assets "that are proceeds from [petitioner's] Federal health care offenses or property of an equivalent value of such proceeds or profits," including but not limited to forty bank accounts and sixteen parcels of property. App. 8, 12. On the same date, a federal grand jury returned an Indictment against petitioner that tracked the allegations of the civil complaint. The Indictment invoked 18 U.S.C. § 982 and 21 U.S.C. § 853 to seek forfeiture of assets traceable to the crimes charged, as well as substitute assets. However, the government did not seek a restraining order under section 853(e), having already obtained the ex parte TRO in the parallel civil proceeding under section 1345. The government arrested petitioner and served her with a copy of the civil action.

In the civil case before Judge Huck, petitioner filed a Motion to Modify the Restraining Order to Release Assets for the Defense of the Related Criminal Case, so that petitioner could retain counsel to defend her, no small task given the volume of discovery (750 banker boxes of documents) related to over 1,900 Medicare patients, over 1,000 private pay/insurance patients, over 200 prescribing doctors, over 400 nurses/therapists/home health aides, and more than 20

laboratories that performed blood testing. DE58:2; DE8-9. As the government and Judge Huck acknowledged, petitioner's net worth was far less than $45 million, so the ex parte TRO effectively prohibited her from spending any funds for her defense. App. 12. Petitioner proffered that she owned untainted assets, not traceable to Medicare revenue, and argued that a court order prohibiting her from using her untainted assets for her criminal defense categorically violated the Fifth and Sixth Amendments:

> Defendant Luis submits that the Fifth and Sixth Amendments, individually and in combination, require that the court exempt from restraint and forfeiture those assets needed for (and ultimately expended on) her legal defense to the charges pending before Judge Cooke. By freezing even a defendant's untainted assets before trial, the government not only "cripple[s] a defendant's ability to retain [private] counsel," but also takes from her the funds she would otherwise invest in her defense for the best and most industrious investigators, experts, paralegals, and law clerks, to at least attempt to match the litigation support available to the United States Attorney's Office.

DE46:13-14 (citations and quotations omitted); *see* App. 29.

Judge Huck convened a hearing pursuant to section 1345(b). The government proceeded exclusively on a "kickback" theory, expressly eschewing reliance on the theory that Medicare was billed for unnecessary

services. DE67:12-19; DE71:6-7; DE87:13-21. Judge Huck accepted the FBI agent's written declarations as the direct testimony. Those declarations summarized the unsworn hearsay and double hearsay from unnamed confidential informants who claimed that they had been paid kickbacks.

Petitioner requested a "full adversarial hearing where she should be allowed to cross-examine the [confidential informants]." App. 16. Judge Huck refused, concerned that "[t]his type of extensive hearing would be tantamount to requiring the Government to preview its entire case." App. 20. Instead, Judge Huck permitted defense counsel to cross-examine the FBI agent. The cross-examination revealed that the confidential informants had themselves engaged in other criminal activity, had significant credibility issues, and were cooperating with the government in exchange for leniency. Apart from summarizing the unsworn debriefings of the confidential informants and bank account information, the FBI agent had no personal knowledge of the facts. He reported that the health care companies received gross proceeds from Medicare approximating $45 million, of which petitioner retained approximately $4.5 million (after paying operating costs). App. 14. As for the total dollar value of kickbacks paid, the FBI agent was not specific, testifying only that petitioner and her codefendants withdrew over $1 million in cash over a three year period. DE96-1:5; DE135:99.

Petitioner submitted evidence, which the government did not rebut, that her health care business

generated more than $15 million in revenues from sources other than Medicare – not covered by the civil complaint or indictment. DE135:90-91 and Defense Exhibit 2. The government and petitioner stipulated that "the [petitioner] had made a sufficient showing that the TRO may currently be restraining substitute assets that would otherwise be available to retain counsel of choice." DE135:90.[3]

D. The District Court's Published Opinion *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. June 21, 2013)

Judge Huck issued a published opinion denying petitioner's motion for release of assets to retain counsel and granting the motion for preliminary injunction in the amount of $45 million. App. 8-34. Judge Huck found that "the indictment and [the FBI Agent's] declarations establish[ed] probable cause to

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[3] In a post-hearing submission, petitioner challenged the government's entitlement to restrain $45 million of Medicare revenues paid to petitioner's companies, given that the government relied exclusively on a kickback theory. Petitioner argued that her alleged kickback scheme caused no "loss" to Medicare, so the government was not entitled to a restraining order against all the Medicare revenue. *See United States v. Medina*, 485 F.3d 1291, 1304 (11th Cir. 2007) ("There was no evidence presented that these claims were not medically necessary. Even though . . . Medicare would not pay a claim if they knew parties were receiving kickbacks, this is not sufficient to establish a loss to Medicare.").

satisfy the elements for injunctive relief under § 1345." App. 14.[4]

With regard to the constitutional issue, Judge Huck recognized that this Court had already held that the "qualified right [to counsel of choice] does not permit a criminal defendant to use assets that are the proceeds of criminal activity to retain counsel." App. 30 (emphasis added). However, Judge Huck acknowledged: "The more difficult question is the one presented here. That is, whether a criminal defendant has a Sixth Amendment right to use *untainted*, substitute assets to retain counsel of choice." App. 30

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[4] Judge Huck acknowledged that "[r]egarding the applicable burden of proof, there is considerable disagreement in the case law. Several courts have applied the preponderance of the evidence standard to claims for injunctive relief under section 1345. Other courts have concluded that a showing of only probable cause is required." App. 11 (citations omitted). Judge Huck concluded that "probable cause is the correct burden of proof," *id.*, but noted that "[e]ven under the preponderance standard, the Government has carried its burden of proof to enter an injunction restraining at least $40.5 million dollars [sic], which is 90% of $45 million. This finding is based on the indictment, as well as Special Agent Warren's affidavits. . . ." App. 15 n.3. Petitioner argued for a categorical prohibition against the restraint of untainted assets needed for counsel of choice. Alternatively, petitioner argued that the "limited hearing [did] not give the court a basis to make reliable 'findings of fact,' as the government's presentation was based on unsworn hearsay – indeed multiple hearsay in some instances – from inherently unreliable declarants." DE102:8. Petitioner argued that if a judicial finding could, in theory, suffice to restrain untainted assets, then a quantum of proof higher than mere preponderance would be required. DE102:11.

(emphasis added). Admitting that "the answer to this question is far from clear," App. 31, Judge Huck nonetheless concluded that "there is no Sixth Amendment right to use untainted, substitute assets to hire counsel." App. 32.

Judge Huck found illustrative a variation of the bank robber hypothetical from earlier cases, including *Caplin & Drysdale, Chtd.*, 491 U.S. at 626 (using a bank robbery proceeds hypothetical to explain that a defendant "has no Sixth Amendment right to spend another person's money for services rendered by an attorney. "). Judge Huck posited:

> The reason the bank robber is not permitted to use the [bank's] $100,000 to hire a lawyer is obvious. The money does not belong to him. But suppose the bank robber in the example above spent the $100,000 that he stole. It just so happens, however, that he has another $100,000 that he obtained legitimately. Should his decision to spend the $100,000 he stole mean that he is free to hire counsel with the other $100,000 when Congress has authorized restraint of those substitute assets? The reasonable answer is no. The bank has the right to have those substitute, untainted assets kept available for return as well.

App. 32.

E. The Eleventh Circuit Opinion *United States v. Luis*, 564 F. App'x 493 (11th Cir. 2014)

Petitioner appealed Judge Huck's civil injunction. The Eleventh Circuit issued a *per curiam*, unpublished opinion rejecting the constitutional claims:

> After reviewing the record, reading the parties' briefs and having the benefit of oral argument, we affirm the district court's order granting the government's motion for a preliminary injunction. The arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley*; *Caplin & Drysdale Chartered; Monsanto*; and [the Eleventh Circuit's decision in] *DBB, Inc.* Accordingly, we affirm the district court's order granting the government's motion for a preliminary injunction.

App. 2-3 (citations omitted).

Petitioner sought rehearing and rehearing en banc, noting that the Eleventh Circuit had previously warned, in dicta, that restraining untainted assets needed to retain counsel would have constitutional implications:

> There is the possibility that prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets. The loss of such legitimate assets would improperly cripple a defendant's ability to retain counsel.
>
> * * *

> If the defendant proves at trial or in a collateral proceeding that prosecutors, acting in bad faith, restrained assets which they knew or should have known to have no connection with criminal activity, a conviction would be in great jeopardy due to a denial of the Sixth Amendment right to counsel of choice.

United States v. Bissell, 866 F.2d 1343, 1355 (11th Cir. 1989) (addressing the restraint of tainted assets under 21 U.S.C. § 853). Rehearing was denied on July 9, 2014. App. 35-36.

At the request of petitioner and the government, Judge Cooke stayed the parallel criminal proceedings pending the outcome of this petition for a writ of certiorari, as petitioner is prohibited by court order from spending her untainted assets to retain counsel in the criminal case.[5]

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[5] Petitioner is not in custody, having been admitted to pretrial release by Judge Cooke. There are no other defendants awaiting trial in the criminal case.

REASONS FOR ISSUING THE WRIT

A. The United States Court of Appeals for the Eleventh Circuit Has Decided an Important Question of Federal Law That Has Not Been, but Should Be, Settled by This Court

The restraint of untainted assets needed to retain counsel poses a serious threat to the constitutional right to counsel of choice and the balance of forces in a criminal case. A statute that dispossesses a presumptively innocent defendant of her untainted assets before trial – denying her the financial ability to retain counsel – should be of great concern to this Court.

This Court has previously addressed the constitutionality of restraining and forfeiting *tainted* assets earmarked for attorneys' fees. In the context of 21 U.S.C. § 853, *Caplin & Drysdale, Chtd.* rejected a Sixth Amendment challenge to the forfeiture of drug proceeds paid to a criminal defense attorney, reasoning that under the "relation-back" doctrine of the forfeiture statutes, the government has a vested property interest in tainted property upon commission of the act giving rise to forfeiture. 491 U.S. at 627. The Court reasoned that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of counsel.'" *Id.* at 626 (emphasis added) (citation

omitted). This "taint theory" has "long been recognized in forfeiture cases." *Id.* at 627 (citation omitted).

Based on the same reasoning, *Monsanto* upheld the pretrial restraint of *tainted* assets under 21 U.S.C. § 853(e) against a Sixth Amendment challenge. *Monsanto*, 491 U.S. at 616.

And just Last Term, *Kaley* held that when the government restrains *tainted* assets needed to retain counsel of choice under section 853(e), the Fifth and Sixth Amendments do not require that a defendant be afforded a pretrial hearing to challenge the grand jury's finding of probable cause. *Kaley*, 134 S. Ct. at 1100-05.

These cases all involved tainted assets that were allegedly traceable to, or the instrumentalities of, a crime. *See, e.g., Caplin & Drysdale, Chtd.*, 491 U.S. at 629 (describing "ill-gotten gains" and "profits of crime" as forfeitable); *Monsanto*, 491 U.S. at 602 (noting that the indictment alleged that the assets subject to forfeiture "had been accumulated by respondent as a result of his narcotics trafficking"); *Kaley*, 134 S. Ct. at 1095 (noting that "no one contests that the assets in question derive from, or were used in committing, the offenses"). This circumstance animated the Court's decisions. *See Caplin & Drysdale, Chtd.*, 491 U.S. at 626 (using a bank robbery proceeds hypothetical to explain that a defendant "has no Sixth Amendment right to spend another person's money for services rendered by an attorney. ");

Kaley, 134 S. Ct. at 1096-97 (recalling the bank robbery proceeds hypothetical to hold that *Caplin & Drysdale, Chtd.* "cast the die" on the Kaleys' constitutional challenge). No aspect of the Court's holdings in *Caplin & Drysdale, Chtd.*, *Monsanto*, or *Kaley* suggested that the pretrial restraint of *untainted* assets would meet a similar fate.

This Court has held that the restraint of tainted assets does not offend the Sixth Amendment because under the relation-back doctrine proceeds traceable to the offense do not belong to the defendant in the first place. *Caplin & Drysdale, Chtd.*, 491 U.S. at 627. The government's right to property traceable to the crime vests upon the commission of the crime, even if title is not perfected until judgment. *United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. 111, 126 (1993).

By contrast, as other circuits have recognized, the relation-back doctrine does not apply to untainted assets, either as a matter of statutory construction or common law. *See, e.g., United States v. Erpenbeck*, 682 F.3d 472, 477-78 (6th Cir. 2012); *United States v. Jarvis*, 499 F.3d 1196, 1204 (10th Cir. 2007). Unlike tainted assets, untainted, substitute assets are owned by the defendant irrespective of the crime and, by definition, are not criminal proceeds. The government possesses no property right in a defendant's untainted assets prior to trial.

The law and our nation's history recognize a constitutionally significant distinction between tainted and untainted assets. In England, three kinds of forfeiture had been established when the Sixth Amendment was ratified in the United States: 1) deodand, 2) forfeiture upon conviction for a felony or treason, and 3) statutory forfeiture. *See generally Austin v. United States*, 509 U.S. 602, 612-13 (1993). Deodand (not relevant to this case) reflected the view that the value of an object "causing the accidental death of a King's subject was forfeited to the Crown." *Id.* at 611 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974)). Forfeiture upon conviction for a felony or treason (*i.e.*, *in personam* forfeiture) was a forfeiture of estate, which served to punish felons and traitors for violating society's laws. Statutory forfeiture sought to forfeit objects used in violation of the customs and revenue laws (*i.e.*, *in rem* forfeitures). *Austin*, 509 U.S. at 612.

"Of England's three kinds of forfeiture, only the third took hold in the United States." *Id.* at 613. That is, the only forfeiture recognized by "the common law courts in the Colonies – and later in the states during the period of Confederation" – was *in rem* forfeiture, based on the fiction that the property itself is guilty of the crime and thereby tainted. *Id.*; *see also 92 Buena Vista Avenue*, 507 U.S. at 121 ("In all of these early cases the Government's right to take possession of property stemmed from the misuse of the property itself.").

The Founding Fathers so disdained *in personam* "forfeiture of estate" penalties that they banned them in the Constitution for the crime of treason. *See* U.S. Const., art. III, § 3, cl. 2. "The First Congress [in 1790] explicitly rejected *in personam* forfeitures as punishments for federal crimes, and Congress reenacted this ban several times over the course of two centuries." *United States v. Bajakajian*, 524 U.S. 321, 328 n.7 (1998) (citation omitted). It was not until 1970 that Congress resuscitated the *in personam* forfeiture penalty for organized crime and major drug trafficking; not until 1984 that these laws authorized ex parte pretrial restraining orders (*e.g.*, 21 U.S.C. § 853(e)); not until 1986 that the laws authorized the forfeiture of substitute assets upon the satisfaction of certain conditions, 21 U.S.C. § 853(p); and not until 1996 that Congress authorized forfeitures for health care fraud offenses (18 U.S.C. § 982(a)(7)).

The notion that a court, upon request of the government, would enjoin a presumptively innocent accused from using her own legitimately-earned assets to retain counsel – so that these untainted, substitute assets would be available to the government as an *in personam* penalty upon conviction – would have been inconceivable to the Founding Fathers. After all, at the time the Sixth Amendment was ratified, the right to appointed counsel had not yet been recognized as fundamental in all criminal cases. *See generally Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). In those days, the only lawyer available to a criminal defendant

was the lawyer who the defendant could afford to retain.

Moreover, criminal forfeiture is a form of punishment. *United States v. Bajakajian*, 524 U.S. at 328. A criminal defendant's present interest in her untainted assets for purposes of retaining counsel far outweighs the government's contingent future interest in confiscating those assets as a punishment, even if to satisfy a possible restitution order in the event of conviction.

> And we are not talking about [unfreezing] all of a defendant's assets that are subject to forfeiture – only those that the defendant can show are necessary to secure [her] counsel of choice a discrete portion of the assets the Government seeks. The statistics cited by the Court on the total amount of assets recovered by the Government and provided as restitution for victims, [*Kaley*, 134 S. Ct.] at 1094, n. 1, are completely beside the point.

Kaley, 134 S. Ct. at 1113 (Roberts, C.J., dissenting). The government's financial interest in the untainted funds needed for a legal defense must yield to the constitutional rights of the accused.

The government's position in the court below – that untainted assets needed to retain counsel may be restrained – is an about-face. The Solicitor General conceded at the October 2013 oral argument in *Kaley* that a defendant has a constitutional right to a hearing on whether property restrained under 21 U.S.C. § 853 is traceable or related to the crime charged in

the indictment. *Kaley*, 134 S. Ct. at 1095 n.3 ("At oral argument, the Government agreed that a defendant has a constitutional right to a hearing on that question."). And the government has uniformly maintained that, as a matter of statutory construction, 21 U.S.C. § 853(e) authorizes the pretrial restraint of substitute assets.[6] *E.g.*, *In re Billman*, 915 F.2d at 921. So the government's concession at the *Kaley* oral argument "that due process guarantees defendants a hearing to contest the traceability of the restrained assets to the charged conduct," *Kaley*, 134 S. Ct. at 1111 (Roberts, C.J., dissenting), must mean that if the government is unable to trace the assets to the alleged crime, then the Constitution forbids the continued restraint of the (untainted) assets, at least in an amount sufficient to allow the defendant to retain her counsel of choice.

This Court "[did] not opine on the matter." *Kaley*, 134 S. Ct. at 1095 n.3.[7] However, Chief Justice Roberts,

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[6] As previously noted, *supra* note 1, the circuit courts are divided as to whether the statutory language of the criminal forfeiture statutes, 21 U.S.C. § 853 and 18 U.S.C. § 1963, which are virtually identical, authorize the pretrial restraint of untainted, substitute assets.

[7] This Court did observe that even though section 853 does not provide for a post-indictment hearing, lower courts "have uniformly allowed the defendant to litigate [in a pretrial hearing] whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Kaley*, 134 S. Ct. at 1095. Those lower courts that construe section 853 as not authorizing the restraint of substitute assets, *see supra* note 1, have granted

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joined in dissent by Justices Sotomayor and Breyer, expressed agreement that the Constitution requires tracing the restrained asset to the charged crime. *Kaley*, 134 S. Ct. at 1108 & n.2 (Roberts, C.J., dissenting) ("Neither the Government nor the majority gives any reason why the District Court may reconsider the grand jury's probable cause finding as to traceability – and in fact constitutionally must, if asked – but may not do so as to the underlying charged offenses."). Presumably that suggests that at least three Justices share the view that if the government fails to trace an asset to the charged crime, then the Constitution commands the release of that untainted asset when needed to retain counsel in a criminal case.

Of course, it is now well settled that the erroneous deprivation of the right to "be defended by the counsel he believes to be the best" is per se reversible, because it affects "the framework within which the trial proceeds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146, 148-50 (2006). As the Chief Justice explained, the adversary system of justice depends upon confidence in "an independent bar as a check

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these traceability hearings to insure that the government is not restraining *any* untainted assets, because untainted assets are beyond the reach of the statute in those circuits. In the one circuit that has construed section 853 as authorizing the restraint of untainted assets, courts have required traceability hearings to protect the defendant's right to counsel of choice under the Sixth Amendment, limiting the release of untainted assets to only so much as is needed for legal expenses. *Farmer*, 274 F.3d at 804-06. *See post* at 25-27.

on prosecutorial abuse and government overreaching. Granting the Government the power to take away a defendant's chosen advocate strikes at the heart of that significant role." *Kaley*, 134 S. Ct. at 1114-15 (Roberts, C.J., dissenting). To the extent that the *Kaley* "decision erode[d] that confidence by permitting the Government to deprive a criminal defendant of his right to counsel of choice" through a freeze of *tainted* assets, *id.* at 1114, then surely the Eleventh Circuit's decision upholding the restraint of *untainted* assets needed for counsel of choice has further eroded, if not decimated, whatever confidence remained after *Kaley*.

B. The United States Court of Appeals for the Eleventh Circuit Has Entered a Decision in Conflict With the Decision of Another United States Court of Appeals on the Same Important Matter

The Eleventh Circuit held that a pretrial restraint under 18 U.S.C. § 1345 of untainted, substitute assets needed to retain private counsel in a criminal case does not violate either the Fifth or Sixth Amendments. That holding creates a conflict between circuits on a question of constitutional law.

In the Fourth Circuit, where untainted, substitute assets are subject to pretrial restraint, under 21 U.S.C. § 853, *see In re Billman*, 915 F.2d at 921, the Court of Appeals has held that the Sixth Amendment prohibits the restraint, to the extent that substitute assets are needed to retain counsel:

> While there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [*the defendant*] *still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice.*
>
> * * *
>
> When assets are seized pursuant to civil forfeiture, the hearing right applies only insofar as the civil seizures affect a defendant's right to select his counsel of choice in a related criminal case, not in the civil forfeiture case itself. And the hearing is certainly not the forum to reach a definitive conclusion on the legality of each asset seized. Instead, a brief hearing will provide *an opportunity for* [*the defendant*] *to prove by a preponderance of the evidence that the government seized untainted assets without probable cause and that he needs those same assets to hire counsel.* The government for its part may present evidence that [the defendant] has other substantial assets with which to hire attorneys and/or evidence of probable cause to believe that the seized assets are tainted and forfeitable.

United States v. Farmer, 274 F.3d 800, 804-06 (4th Cir. 2001) (emphasis added, citations omitted);[8]

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[8] Before *Farmer* was decided, the Fourth Circuit in *In re Billman*, 915 F.2d at 920-22, had upheld the pretrial restraint of substitute assets under the RICO forfeiture statute, 18 U.S.C. § 1963, against both a statutory and constitutional challenge.

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accord United States v. Najjar, 57 F. Supp. 2d 205, 209-10 (D. Md. 1999) (modifying restraining order to exempt substitute asset because the defendant's "Sixth Amendment right to counsel is simply more important than the Government's interest in the untainted portion of Defendant's substitute property"); *contra United States v. Wingerter*, 369 F. Supp. 2d 799 (E.D. Va. 2005) ("[T]he key distinction for determining whether pretrial restraint of property violates a defendant's Sixth Amendment right is not whether the property is *tainted* or *untainted*, but rather whether it is *forfeitable* or *nonforfeitable*. Thus, all forfeitable property, including substitute property, may be restrained pretrial without violating a defendant's Sixth Amendment right; it is nonforfeitable

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However, *In re Billman* dealt with a defendant who proposed to pay her counsel not with her own assets, but with the assets fraudulently conveyed to her by her fugitive co-defendant, without consideration. Given that she "did not qualify as a bona fide purchaser for value," the Fourth Circuit rejected her Sixth Amendment claim to use her co-defendant's substitute assets to pay her counsel of choice. *Id.* at 921-22. *In re Billman* did not address a defendant's right to use her *own* substitute assets to retain counsel of choice. Logically, if *In re Billman* stood for the proposition that the restraint of a defendant's *own* untainted assets needed to pay counsel of choice comported with the Sixth Amendment, then *Farmer* would have held that no tracing hearing was required. Instead, as quoted in the accompanying text, the Fourth Circuit, after *In re Billman*, held that the Sixth Amendment required a tracing hearing to "provide an opportunity for Farmer to prove by a preponderance of the evidence that the government seized untainted assets without probable cause and that he need[ed] those same assets to hire counsel." *Farmer*, 274 F.3d at 804.

property that may not be restrained"); *see generally United States v. Patel*, 888 F. Supp. 2d 760, 767-70 (W.D. Va. 2012) (canvassing the case law but not deciding the constitutional question).

In the analogous context of securities fraud cases, a number of district courts have concluded that the Fifth and/or Sixth Amendments prohibit the restraint of untainted assets needed to retain counsel in a parallel criminal case:

> [The criminal defendant] has demonstrated – and the Commission does not dispute – that without advancement of the frozen funds, she will be unable to pay defense counsel's fees in the criminal action. Under such circumstances, the Commission is required to demonstrate that the frozen funds are traceable to fraud.
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> * * *
>
> Were [the criminal defendant] seeking to use frozen funds to pay her defense costs in a civil action, the fact that potential disgorgement in this case exceeds the amount of money that has been frozen might be sufficient to prevent this Court from releasing the funds. However, [the criminal defendant] seeks advancement of fees and expenses only in the criminal action against her. While [the criminal defendant] may not be advanced frozen funds traceable to the fraud she helped to perpetrate, there has been no showing that all of the funds currently restrained are traceable to fraud.

SEC v. FTC Capital Markets, Inc., No. 09 Civ. 4755 (PGG), 2010 WL 2652405, at *7 (S.D.N.Y. June 30, 2010).

> Although a court may impose an asset freeze in a civil case, notwithstanding a companion criminal case, these circumstances dictate that the court pay particular attention to the defendant's Fifth and Sixth Amendment rights.
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> * * *
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> Accordingly, in light of the fact that my order freezing [the criminal defendant's] personal assets may hinder his ability to obtain counsel of choice in the related criminal case, I conclude that that order may not be continued through trial in the absence of an adversary hearing as to whether the SEC has made a showing that the frozen assets are traceable to fraud.

SEC v. Coates, No. 94 Civ. 5361 (KMW), 1994 WL 455558, at *3 (S.D.N.Y. Aug. 23, 1994); *accord SEC v. McGinn*, No. 10-CV-457, 2012 WL 1142516 (N.D.N.Y. Apr. 12, 2012).

C. This Case Presents a Suitable Vehicle for the Court to Resolve this Important Constitutional Issue That Has Divided the Lower Courts

The procedural posture of this case and the record below make this case an appropriate candidate for resolving the constitutionality of restraining

untainted assets needed to retain counsel in a criminal case.

1. The fact pattern and procedural history are straightforward. Petitioner is indicted for allegedly defrauding the government of $45 million. The government has obtained an injunction that restrains all of petitioner's assets, including untainted assets that would otherwise be available for her defense in the criminal case. Thus, petitioner is enjoined by court order from exercising her constitutional rights to retain counsel and fund her criminal defense.

2. The constitutional issue is properly framed. The statute under review explicitly authorizes district courts to restrain property traceable to the alleged fraud, as well as "property of equivalent value." 18 U.S.C. § 1345(a)(2)(B)(i). In the district court and in the court of appeals, petitioner challenged the constitutionality of the restraint of that much of her "property of equivalent value" (*i.e.*, her untainted assets) needed to retain counsel and fund her criminal defense. The issues have been preserved for review by this Court.

3. Although unpublished and only "persuasive authority," *see* 11th Cir. R. 36-2, the Eleventh Circuit's decision affirming Judge Huck's published opinion will have de facto precedential value and long-lasting implications. It will embolden prosecutors to more aggressively target legitimate assets for restraint, often through ex parte proceedings, and "stack the deck in the government's favor by crippling

the defendant's ability to afford high-quality counsel." *United States v. Kaley*, 579 F.3d 1246, 1267 (11th Cir. 2009) (Tjoflat, J., concurring).

For many defendants – including innocent ones – the restraint will make it difficult, if not impossible, to retain any private counsel at all. With "persuasive authority" weighing against them and thus the prospect of payment bleak, who among the criminal defense bar will, in the future, invest the time and resources to shepherd an asset-restraint case through the trial and appellate courts? From arrest through appeal, this case has taken nearly two years to litigate. At least petitioner has been represented, up to now, by her counsel of choice, who has challenged the restraint since her arrest and has teed up the constitutional issue for this Court's consideration.[9]

4. The restraint and forfeiture of attorneys' fees is a matter of immediate concern not only to defendants, but to the defense bar, as well. The Southern District of Florida, in particular, has been at the front line in the legal battle over attorneys' fees in criminal cases.

Kaley itself arose out of a prosecution in the Southern District of Florida, a case in which "the Government was pitching a fraud without a victim,

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[9] Coincidentally, petitioner's counsel of choice was counsel of record in *Kaley*, so counsel had familiarity with the legal issue when undertaking the representation in the courts below.

because no Government witness took the stand [in the co-defendant's case] to claim ownership of the allegedly stolen devices." 134 S. Ct. at 1107 (Roberts, C.J., dissenting). Even after the defendants exposed that "the theory of prosecution [was] legally defective," *id.* at 1113, the government did not relent, taking full advantage of its power to restrain assets needed for defense counsel to challenge arguably bogus charges. After this Court affirmed the lower court's order restraining assets, the Kaleys were unable to retain counsel of choice and are now set for trial in November 2014, represented by other attorneys. *United States v. Kaley*, Case No. 07-CR-80021-DPG (S.D. Fla. July 25, 2014) (DE309).

In the case of Manuel Noriega, who was charged with various narcotics-related offenses in the Southern District of Florida, the government effected the restraint and/or seizure of millions of dollars of assets, leaving the "former de facto ruler of Panama" without funds to retain counsel. *United States v. Noriega*, 746 F. Supp. 1541, 1542 (1990). It was unclear to the district court whether "any efforts were made [by the government] to differentiate between assets and properties allegedly tainted by illegal drug activities and those acquired by other means." *Id.* at 1546. Over the government's objection, the district court ruled that only tainted assets could be restrained, ordering that untainted "property [would] be cleared of restraint." *Id.* The district court reasoned:

> The Court fails to see what possible government interest justifies its freezing of Defendant's assets without setting forth any basis for its allegations that the assets are tainted by illegal activity. The danger that an innocent person may be convicted because of the unfair deprivation of assets that would have been used to retain his counsel of choice is simply too great to permit a freeze to go unchallenged.
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> * * *
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> In short, the Court finds that where a criminal defendant's only assets available for payment of attorneys' fees have been placed out of reach by government action, due process mandates that the government be required to demonstrate the likelihood that the restrained assets are connected to illegal activity.

Id. at 1544-46.

In *United States v. Abbell,* two defense lawyers were indicted in the Southern District of Florida for money laundering, 18 U.S.C. § 1956, in relation to their receipt of funds from a client, a reputed drug lord residing in Colombia.

> [E]vidence showed that [the client] owned a wide variety of "legitimate" businesses, including a chain of pharmacies, grocery stores, construction companies, and a soccer team from which [the client] could have paid [the lawyers]. [The Eleventh Circuit] accept[ed] that [the client]'s businesses produced

> some amount of cash flow from which the funds used in transactions underlying this case might have been derived.

271 F.3d 1286, 1295 (11th Cir. 2001). Nevertheless, the Eleventh Circuit upheld their convictions based on "a finding that [the client]'s illegal and legal moneys – to the extent legal moneys existed – were commingled, thus tainting all funds originating from [the client]." *Id.* The government's aggressive stance in *Abbell*, buoyed by the Eleventh Circuit's affirmance, sent a strong word of caution to the private defense bar: Careful when accepting even *untainted* funds from your client.

Thereafter, in *United States v. Velez*, 586 F.3d 875 (11th Cir. 2009), also prosecuted in the Southern District of Florida, the government pursued money laundering charges against two attorneys and a certified public accountant who, in the wake of *Abbell*, had been hired by a law firm to vet the source of fees for the defense of a client awaiting trial for narcotics trafficking. The indictment alleged that the funds were tainted after all, so the corresponding monetary transactions – undisputedly for the payment of legal fees – violated 18 U.S.C. § 1957. *Velez*, 586 F.3d at 876.

The government was not dissuaded by the plain language of the statute, which excludes from its scope "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution," 18 U.S.C. § 1957(f)(1), resurrecting the same "flawed" analysis that had been

rejected years earlier in a published district court opinion. *United States v. Ferguson*, 142 F. Supp. 2d 1350, 1357-58 (S.D. Fla. 2000) ("If § 1957 were construed in the manner that the United States urges, the exception for transactions necessary to protect an individual's Sixth Amendment rights would amount to no exception, at all.").[10]

The district court granted defendants' motion to dismiss, *United States v. Velez*, Case No. 05-CR-20770-MGC, 2008 WL 5381394 (S.D. Fla. 2008), and the Eleventh Circuit affirmed, holding that "the district court was eminently correct [] that Defendants are not subject to criminal prosecution under § 1957(a), because the plain language of § 1957(f)(1) *clearly* exempts criminally derived proceeds used to secure legal representation to which an accused is

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[10] The government was also not deterred by case law from other circuits likewise observing that "the exception appears to have been inserted to prevent the broad reach of the statute from criminalizing a defendant's bona fide payment to her attorney." *United States v. Hoogenboom*, 209 F.3d 665, 669 (7th Cir. 2000) ("Correctly read, the statute offers a defense where a defendant engages in a transaction underlying a money laundering charge with the present intent of exercising Sixth Amendment rights.") (citing *United States v. Rutgard*, 116 F.3d 1270, 1291 (9th Cir. 1997)). Nor did the government heed the dicta from a case within the Eleventh Circuit. *See United States v. Elso*, 422 F.3d 1305, 1309, n.6 (11th Cir. 2005) (acknowledging that "subsection 1957(f) exempts from the definition of 'monetary transaction' 'any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution,'" but declining to extend the exemption to money laundering prosecutions under section 1956).

entitled under the Sixth Amendment." *Velez*, 586 F.3d at 879 (emphasis added). On remand, the government finally abandoned the prosecution. *United States v. Velez*, Case No. 05-CR-20770-MGC (S.D. Fla. Nov. 25, 2009) (DE305) (order granting government's motion to dismiss).

After *Velez*, the government invoked the statute at issue in this case, 18 U.S.C. § 1345, to prevent defense counsel from receiving untainted assets as attorneys fees in a Medicare fraud prosecution. *United States v. American Therapeutic Corp.*, 797 F. Supp. 2d 1289 (S.D. Fla. 2011). The government sought an injunction in the Southern District of Florida against all assets of a defendant, tainted and untainted. In a published opinion, the district court upheld the government's proposed restraint, quoting *Caplin & Drysdale, Chtd.* for the proposition that "the Government does not violate the Sixth Amendment if it seizes . . [ill-gotten gains] and refuses to permit the defendant to use them to pay for his defense." *Id.* at 1294 (brackets in original). Of course, untainted assets are, by definition, not "ill-gotten gains," so the *American Therapeutic Corp.* court erroneously conflated tainted and untainted assets in reaching its decision.

The Eleventh Circuit has made the same mistake in petitioner's case in rejecting the constitutional challenge to the restraint of untainted assets. App. 1-3. Worse yet, its pronouncement that "[t]he arguments made by [petitioner] Luis in this appeal are *foreclosed* by the United States Supreme Court decisions in *Kaley*, *Caplin & Drysdale, Chartered*, and

Monsanto," App. 3 (emphasis added, citations omitted), suggests to the defense bar that the constitutional question has been decided by this Court and any further argument on the subject would be futile, if not frivolous.

To the extent that the constitutional question is not "foreclosed," this Court should say so. Ordinarily, this Court might let an issue "percolate" further in the circuits before resolving it. But this is no ordinary issue. At stake is the right to counsel of choice, the balance of forces in the courtroom, and the public's confidence in the administration of justice. *See Kaley*, 134 S. Ct. at 1114 (Roberts, C.J., dissenting). Allowing the conflict to fester could potentially infect numerous convictions in the future, given that the erroneous denial of counsel of choice is structural error. *Gonzalez-Lopez*, 548 U.S. at 146, 148-50. A clear and prompt directive from this Court is appropriate.

5. At the request of petitioner and the government, Judge Cooke has stayed the criminal case pending the outcome of this petition – rather than force upon petitioner an appointed lawyer to spend months digesting the 750 banker boxes of discovery documents related to thousands of patients, hundreds of doctors, nurses, therapists, and aides and otherwise preparing for a trial that the government estimates will last 15 days. The constitutional question is best resolved now, once and for all, before the government, the court and appointed counsel expend

resources in a lengthy criminal case, in which the accused is being denied her counsel of choice.[11]

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[11] Admittedly, this Court "generally await[s] final judgment in the lower courts before exercising . . . certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari). "Cases presenting the question at issue here, however, typically arise in an interlocutory posture, since orders relating to the restraint of assets are treated as orders 'granting, continuing, modifying, refusing, or dissolving injunctions' for purposes of 28 U.S.C. 1292(a)(1)." Brief for the United States in Response to the Petition for a Writ of Certiorari in *Kaley v. United States*, No. 12-464, at 23-24 (favoring the grant of certiorari, in part because "the question presented could significantly affect the way that the remainder of the proceedings below are conducted. . . ."). This case is a hybrid, as the restraint of untainted assets was ordered by Judge Huck in the civil case, which is now closed, DE145 ("case closed for administrative purposes"); yet the impact on the constitutional rights of petitioner will be felt in the criminal case still pending before Judge Cooke.

CONCLUSION

A court order prohibiting a citizen from spending her own legitimate assets to defend herself in a criminal case would have been unimaginable to the Framers. It is unconstitutional. The Fourth Circuit agrees. The Eleventh Circuit does not. The writ should issue.

Respectfully submitted,

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October 7, 2014

United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Sila LUIS, Defendant-Appellant,
Elsa Ruiz, et al., Defendants.
No. 13-13719. | May 1, 2014.

Attorneys and Law Firms

Kathleen Mary Salyer, Susan Torres, Wifredo A. Ferrer, U.S. Attorney's Office, Miami, FL, for Plaintiff-Appellee.

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Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 1:12-cv-23588-PCH.

Before MARTIN, DUBINA, and SENTELLE,* Circuit Judges.

Opinion

PER CURIAM.

A federal grand jury in the Southern District of Florida indicted Appellant Sila Luis ("Luis") for her

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia Circuit sitting by designation.

role in an alleged Medicare fraud scheme that included kickbacks paid to patients who enrolled with her home healthcare companies. In addition to charging Luis with substantive offenses, the indictment included forfeiture allegations pursuant to the general criminal forfeiture statute. 18 U.S.C. § 982. The government brought this civil action to restrain Luis's assets, including substitute property of an equivalent value to that actually traceable to the scheme, before her criminal trial.

Federal law grants district courts the authority to restrain, pretrial, the assets of those accused of certain kinds of fraud. *Id.* § 1345(a)(2). This includes the authority to restrain "property of equivalent value" to that actually traceable to the alleged fraud. *Id.* § 1345(a)(2)(B)(i). Among the enumerated offenses is a "Federal health care offense," *id.* § 1345(a)(1)(C), defined elsewhere to include conspiracy to defraud the United States and to commit an offense against it, in violation of 18 U.S.C. § 371, and conspiracy to commit healthcare fraud, in violation of 18 U.S.C. § 1349. *Id.* § 24(a)(2).

In this separate civil case, the government moved to restrain Luis's assets pretrial, to include substitute assets not directly traceable to the alleged fraud. After granting a temporary restraining order, the district court held a hearing on a motion for preliminary injunction and ultimately granted the motion. Luis appeals that order, arguing she needs her funds to pay her criminal defense lawyer and that restraining those funds pretrial violates her constitutional rights.

Though we generally review a district court's grant of a preliminary injunction for abuse of discretion, we review questions of law, such as a statute's constitutionality and whether a preliminary injunction violates an individual's constitutional rights, *de novo*. *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1273 (11th Cir.2013).

After reviewing the record, reading the parties' briefs and having the benefit of oral argument, we affirm the district court's order granting the government's motion for a preliminary injunction. The district court conducted an evidentiary hearing where it heard arguments and testimony and found, based on the hearing and the indictment, that there was probable cause to believe that Luis committed an offense requiring forfeiture, that she possessed forfeitable assets, and that she was alienating those assets. The arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley v. United States*, ___ U.S. ___, 134 S.Ct. 1090, 1105, 188 L.Ed.2d 46 (2014); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631, 109 S.Ct. 2646, 2655, 105 L.Ed.2d 528 (1989); *United States v. Monsanto*, 491 U.S. 600, 616, 109 S.Ct. 2657, 2667, 105 L.Ed.2d 512 (1989); and *United States v. DBB, Inc.*, 180 F.3d 1277, 1283-84 (11th Cir. 1999). Accordingly, we affirm the district court's order granting the government's motion for a preliminary injunction.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-23588-CIV-HUCK/O'SULLIVAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

SILA LUIS et al.,

Defendants.
_____/

PRELIMINARY INJUNCTION
AS TO DEFENDANT SILA LUIS

THIS MATTER comes before the Court upon the United States' *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law, pursuant to 18 U.S.C. § 1345, filed on October 2, 2012; the Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction, also filed on October 2, 2012; and the Declarations of Special Agent Clint Warren. The Court entered a Temporary Restraining Order ("TRO") on October 3, 2012, and after being extended several times, it is currently effective through June 28, 2013.

For the reasons in the Court's Order issued on June 21, 2013, the Court finds that the United States has demonstrated that:

1. Defendant Luis has violated and unless enjoined could continue to violate 18 U.S.C. § 1349,

18 U.S.C. § 371, 42 U.S.C. § 1320a-7b(b)(2)(A), and/or has committed a Federal health care offense (as defined in 18 U.S.C. § 24(a)) and unless enjoined could continue to commit a Federal health care offense through the submission of false and fraudulent claims to the Medicare program; and

2. Defendant Luis has alienated or disposed of property, and unless enjoined could continue to alienate or dispose of property, obtained as a result of a Federal health care offense, property which is traceable to such violation, or property of equivalent value.

Based on the foregoing, the Court hereby concludes as follows:

That the requested relief be GRANTED and because the United States' motion is based on 18 U.S.C. § 1345, which expressly authorizes injunctive relief to protect the public interest, no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a preliminary injunction in this case.

It is therefore **ORDERED** and **ADJUDGED** that:

Defendant Sila Luis, her agents, employees, attorneys, and all persons acting in concert and participation with her, including all banking and other financial institutions at which she does business, and all corporations over which she exercises control, who receive actual or constructive notice by personal

service, by publication, or otherwise, be enjoined as follows:

1. From making or submitting or conspiring to make or submit any claims to the Medicare program or any health care benefit program, as defined in 18 U.S.C. § 24(b), in violation of 18 U.S.C. § 1349, 18 U.S.C. § 371, and/or 42 U.S.C. § 1320a-7b, and from committing any Federal health care offense, as defined in 18 U.S.C. § 24;

2. From alienating, withdrawing, transferring, removing, dissipating, or otherwise disposing of, in any manner, any moneys or sums presently deposited, or held on behalf of Defendant Luis by any financial institution, trust fund, or other financial entity, public or private, that are proceeds or profits from Defendant Luis's Federal health care offenses or property of an equivalent value of such proceeds or profits;

3. From alienating, withdrawing, transferring, removing, dissipating, or otherwise disposing of, in any manner, assets, real or personal (including, for example, real estate, motor vehicles, boats and watercraft, jewelry, artwork, antiques, household furniture and furnishings, etc.), in which Defendant Luis has an interest, up to the equivalent value of the proceeds of the Federal health care fraud ($45 million).

IT IS FURTHER ORDERED that Defendant Luis, her agents, employees, attorneys, and all persons acting in concert and participation with her, including all banking and other financial institutions at which

she does business, and all corporations over which she exercises control, are ordered:

4. To preserve all business, financial and accounting records, including bank records, that detail any of Defendants' business operations and disposition of any payment that directly or indirectly arose from the payment of money to any Defendant on behalf of the Medicare program;

5. To preserve all medical records, including patient records, that relate to any Defendants' business operations and/or to services for which claims were submitted to the Medicare program.

This Preliminary Injunction shall remain in force until further Order of the Court, provided, however, that nothing in this Preliminary Injunction shall prevent Defendant Luis from surrendering to the United States any assets frozen by this Preliminary Injunction, if the United States consents to such voluntary surrender.

DONE and ORDERED at Miami, Florida, this 24th day of June, 2013.

/s/ [Illegible]
PAUL C. HUCK
UNITED STATES
DISTRICT JUDGE

cc: Counsel of record

966 F.Supp.2d 1321
United States District Court,
S.D. Florida.

UNITED STATES of America, Plaintiff,
v.
Sila LUIS, et al., Defendants.
Case No. 12-23588-CIV. | June 21, 2013.

Attorneys and Law Firms

Susan Torres, U.S. Attorney's Office, Miami, FL, for Plaintiff.

Howard Milton Srebnick, Black Srebnick Kornspan & Stumpf, Scott Alan Srebnick, Miami, FL, for Defendants.

ORDER

PAUL C. HUCK, District Judge.

THIS MATTER is before the Court upon the United States of America (the "Government['s]") Emergency *Ex Parte* Motion for Temporary Restraining Order and Preliminary Injunction under 18 U.S.C. § 1345 [D.E. # 4] and Defendant, Sila Luis ("Luis['s]") Motion to Modify the Restraining Order to Release Assets for the Defense of the Related Criminal Case [D.E. # 46]. For the reasons discussed below, the Motion for Preliminary Injunction is granted and Luis's Motion to Modify the Restraining Order is denied.

A. Background

a. *Statutory Basis for Injunctive Relief Under 18 U.S.C. § 1345*

Section 1345 allows courts to grant injunctive relief to prevent certain types of fraud and to prevent alienation of property associated with the fraud. 18 U.S.C. § 1345. Thus, a court may enter an injunction under § 1345 preventing mail fraud, wire fraud, banking laws, or the commission of a federal health care offense.[1] *Id.* Section 1345 also allows a court to enter an injunction when an individual alienates or disposes of any property obtained as a result of such violations, to prevent any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value.[2]

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[1] As used in this title, the term "Federal health care offense" means a violation of, or a criminal conspiracy to violate –

(1) section 669, 1035, 1347, or 1518 of this title or section 1128B of the Social Security Act (42 U.S.C. 1320a-7b);or

(2) section 287, 371, 664, 666, 1001, 1027, 1341, 1343, 1349, or 1954 of this title section 301 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331), or section 501 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1131), or section 411, 518, or 511 of the Employee Retirement Income Security Act of 1974, [1] if the violation or conspiracy relates to a health care benefit program.

18 U.S.C. § 24.

[2] The following is the statutory language creating the right to injunctive relief to prevent alienation of property:

(a)(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property,

(Continued on following page)

Id. The "equivalent value" language means that when some of the assets that were obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead. *See United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir.1999).

b. *The Burden of Proof and Elements for Injunctive Relief Under § 1345*

As to the elements for injunctive relief, a reasonable reading of § 1345 indicates that the Government bears the burden to establish that: (1) a Federal health care offense has been committed; (2) the total amount of proceeds obtained from the criminal activity; and (3) that there has been dissipation of assets received as a result of the criminal activity. *See United States v. Brown*, 988 F.2d 658, 663 (6th Cir.1993) (finding § 1345 requires the Government demonstrate that a predicate offense has been committed and the extent of the fraud); *see also* § 1345

> obtained as a result of a [Federal health care offense] or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court –
>
> (A) to enjoin such alienation or disposition of property; or
>
> (B) for a restraining order to –
>
> (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value . .

18 U.S.C. § 1345.

(requiring dissipation of assets for a court to award injunctive relief).

Regarding the applicable burden of proof, there is considerable disagreement in the case law. Several courts have applied the preponderance of the evidence standard to claims for injunctive relief under § 1345. *See Brown,* 988 F.2d 658, 663 (6th Cir.1993); *United States v. Williams,* 476 F.Supp.2d 1368, 1374 (M.D.Fla.2007) (applying the preponderance of the evidence standard); *United States v. Sriram,* 147 F.Supp.2d 914, 938 (N.D.Ill.2001) (same); *United States v. Barnes,* 912 F.Supp. 1187, 1198 (N.D.Iowa 1996) (same); *United States v. Quadro Corp.,* 916 F.Supp. 613, 617 (E.D.Tex.1996) (same); *see also United States v. Legro,* 284 Fed.Appx. 143, 145 (5th Cir.2008) (recognizing disagreement about whether probable cause or preponderance of the evidence standard applies to state a claim for injunctive relief under § 1345 and declining to resolve the issue). Other courts have concluded that a showing of only probable cause is required. *See United States v. Livdahl,* 356 F.Supp.2d 1289, 1294 (S.D.Fla.2005); *United States v. Fang,* 937 F.Supp. 1186, 1197 (D.Md.1996); *United States v. Davis,* No. 88-1705-CIV-ARONOVITZ, 1988 WL 168562, at *1 (S.D.Fla.1988). This Court agrees with those courts that found probable cause is the correct burden of proof[.]

c. *Evidence of Federal Health Care Offenses and Dissipation of Assets*

Pursuant to § 1345, the Court previously entered a temporary restraining order ("TRO") restraining all of Luis's assets. The Government seeks to convert the TRO into a preliminary injunction, and the Court held a hearing on that matter on February 6, 2013. As a basis for the requested injunctive relief, the Government points to the parallel criminal prosecution, where Luis is charged with violations of 18 U.S.C. § 1349 (conspiracy to commit health care fraud) and 18 U.S.C. § 371 (conspiracy to defraud the United States and to commit offenses against the United States). Luis is also charged with violation of 42 U.S.C. § 1320a-7b(b)(2)(B) (paying health care kickbacks) and a forfeiture count under 18 U.S.C. § 982. Luis was indicted by a grand jury on these charges. According to the indictment, the offenses resulted in $45 million of improper Medicare benefits being paid. The parties agree that Luis has much less than $45 million in personal assets.

At the hearing, the Court accepted three declarations of Federal Bureau of Investigation Special Agent Clint Warren ("Special Agent Warren") as direct testimony. Special Agent Warren investigated Luis's businesses, LTC Professional Consultants, Inc. ("LTC") and Professional Home Care Solutions, Inc. ("Professional") for Federal health care fraud. During the investigation, Special Agent Warren received information from nine cooperating witnesses ("CWs")

who worked as nurses and patient recruiters for LTC, Professional, or both.

The CWs said that LTC and Professional defrauded Medicare during the period of January 2006 to June 2012. Before the fraudulent scheme was put into place, Luis signed Medicare enrollment agreements in 2003, 2004, and 2005, whereby she agreed to abide by Medicare laws and regulations, including the Anti-kickback statute. According to the information provided to Special Agent Warren, LTC and Professional paid nurses to recruit patients. The nurses, in turn, gave the patients a portion of the kickbacks in the form of direct payments. The CWs also told Special Agent Warren that LTC and Professional fraudulently billed Medicare for services that were not medically necessary or were not actually provided. One CWs estimated that at least 90% of all Professional and LTC patients were receiving kickbacks. Eight of these CWs specifically identified patients who received kickbacks. The total paid by Medicare for claims submitted on behalf of these patients who were identified was $ 4,356,553.85. During the period of this fraud, however, LTC and Professional collected a total of approximately $45 million from Medicare billings.

Special Agent Warren's declarations also provided information about assets being dissipated. Luis and the other defendants transferred monies from LTC and Professional to themselves directly and by the use of shell corporations that were owned by Luis's family members. There was also evidence that

Luis used the funds to purchase luxury items, real estate, automobiles, and to travel. According to the declarations, Luis also received approximately $4,490,000 of the funds directly. In addition, although the investigation uncovered the fact that Medicare paid LTC and Professional $45 million dollars, only a fraction of the funds were located.

B. Discussion

a. *The Indictment and Declarations of Special Agent Warren Establish Probable Cause to Satisfy the Elements of § 1345*

Initially, the indictment and declarations establish probable cause to satisfy the elements for injunctive relief under § 1345. That is, there is probable cause to believe that: (1) Federal health care offenses have been committed; (2) $45 million was obtained illegally as a result of those offenses; and (3) that there has been dissipation of those monies. An indictment is sufficient to establish probable cause that offenses have been committed and the amount of the proceeds from those offenses. *See United States v. Bissell,* 866 F.2d 1343, 1349 (11th Cir.1989). Here, the Grand Jury indicted Luis for committing Federal health care offenses and found that LTC and Professional improperly obtained $45 million from those offenses.

Furthermore, in other situations where probable cause is required, the finding of probable cause may properly rest upon the affidavit of a law enforcement

officer. *See Illinois v. Gates,* 462 U.S. 213, 226, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (explaining that issuance of a search warrant may be based upon an affidavit of a law enforcement officer when based upon a proper information source). Section 1345 requires there be dissipation of the proceeds. As discussed above, in his investigation, Special Agent Warren discovered that Luis used the funds to purchase luxury items, real estate, automobiles, and for travel. In addition, the investigation uncovered the fact that Medicare paid LTC and Professional $45 million dollars, but only a fraction of the assets could be located. The declaration, which is based upon information discovered in the criminal investigation, establishes probable cause to believe that there has been dissipation of assets.

Thus, the initial requirement to obtain a preliminary injunction, restraining up to $45 million of Luis's assets, has been met.[3]

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[3] Even under the preponderance standard, the Government has carried its burden of proof to enter an injunction restraining at least $40.5 million dollars, which is 90% of $45 million. This finding is based on the indictment, as well as Special Agent Warren's affidavits detailing the crimes, receipt of Medicare funds, and dissipation of assets, including CW9's statement that 90% of LTC and Professional's patients received kickbacks.

b. *Luis's Right to a Hearing and Right to Challenge the Factual Basis of the Probable Cause Finding*

The parties disagree about whether Luis was entitled to a hearing and, if so, the scope of the hearing and whether she has the right to challenge the probable cause determination. The Government's position is that Luis has no right to challenge the factual basis of the probable cause finding, which is based solely upon the indictment and declarations of Special Agent Warren. Luis, on the other hand, argues that she is entitled to a full adversarial hearing where she should be allowed to cross-examine the CWs. In this case, Luis was permitted a hearing, where she was allowed to cross-examine Special Agent Warren but was not permitted to cross-examine the CWs.

As an initial matter, § 1345 does not require a hearing by its language. However, the Fifth Amendment provides "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Accordingly, the general rule is that a person cannot be deprived of property without a prior hearing. *Bissell,* 866 F.2d at 1352. However, there is an exception that exists when a criminal defendant's assets are seized or restrained. *See id.* But this exception does not mean that a criminal defendant subject to asset restraint is never permitted a hearing; a post-seizure hearing is sometimes required. *Id.*

In the criminal forfeiture context, the factors to determine whether a hearing is required are derived from the Supreme Court's Sixth Amendment speedy trial analysis in *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). *Bissell,* 866 F.2d at 1352. However, because § 1345 is a civil statute, the factors from *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) are determinative. These factors are: "the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335, 96 S.Ct. 893.

The *Mathews* factors weigh in favor of a hearing when all of a criminal defendant's assets are restrained under § 1345, which is the case here. The Eleventh Circuit has explained that "[b]eing effectively shut out by the state from retaining the counsel of one's choice in a serious criminal case is a substantial source of prejudice." *United States v. Kaley (Kaley I),* 579 F.3d 1246, 1258 (11th Cir.2009); *see also United States v. Kaley (Kaley II),* 677 F.3d 1316, 1332 (11th Cir.2012) (Edmonson, J., concurring) ("Property rights, in themselves, deserve to be amply guarded by American courts. But when a citizen's liberty depends to a high degree on his property, the stakes are particularly high."). Moreover, there is also a risk

of erroneous deprivation without a hearing: "A prosecutor has everything to gain by restraining assets that ultimately may not be forfeited. By doing so, he can stack the deck in the government's favor by crippling the defendant's ability to afford high-quality counsel." *Kaley I,* 579 F.3d at 1266 (Tjoflat, J., concurring). Although there is no indication of prosecutorial abuse in this case, the existence of these incentives increase the likelihood the risk of an erroneous deprivation without a hearing. The third factor – the government's interest and the burdens associated with additional procedural requirements – also weighs in favor of a hearing. While the Government has an interest in not previewing its criminal case before the criminal trial, this problem can be alleviated by properly limiting the scope of the hearing.

The Government, however, contends that no hearing was required because § 1345 permits restraint of substitute assets that are not traceable to criminal activity. As discussed above, the indictment and declarations establish probable cause to believe that Luis committed Federal health care offenses, resulting in $45 million of improper Medicare benefits being paid, and that she has dissipated those assets. There is also no dispute over the fact that Luis is in possession of much less than $45 million in personal assets. As such, assuming the probable cause finding is correct, because § 1345 permits the restraint of substitute assets, there is no possibility that a preliminary injunction could reach assets that are not properly subject to restraint under § 1345.

Therefore, the Government's position is that there is nothing that could be challenged at a hearing because Luis "may not challenge the validity of the indictment itself. " *Bissell,* 866 F.2d at 1349.

However, the Government's position on the due process right to a hearing was rejected by *Kaley I.* In that case, the district court found that there was probable cause to believe that certain assets were traceable to a criminal offense and, therefore, properly subject to a protective order restraining the property. *Kaley I,* 579 F.3d at 1256. Relying on *Bissell,* the district court further found that an evidentiary hearing was not required because the defendants were not permitted to challenge the validity of the indictment. *Id.* The *Kaley I* court found that the district court erred on this point. *Id.* at 1257-58. According to the opinion, "notwithstanding the probable cause determination, the [defendants] were entitled to challenge the restraints on their assets; in doing so, they would not be requiring the Government to establish the charged offense." *Id.* at 1258.

In accordance with her due process right to a hearing, Luis was permitted an evidentiary hearing and the opportunity to cross examine Special Agent Warren. Contrary to Luis's position, however, she had no right to cross-examine the CWs. This type of extensive hearing would be tantamount to requiring the Government to preview its entire case. However, for the reasons discussed above, the Government's position that Luis was not permitted to a hearing and

is not permitted to challenge the initial probable cause finding is misplaced.

c. *Luis's Arguments Opposing a Preliminary Injunction*

Luis raises two arguments challenging the factual basis for probable cause. First, she argues that the Government has not proffered evidence of a violation of the Anti-kickback Statute, 42 U.S.C. § 1320a-7b(b)(2)(B). According to Luis, in this case, payment of kickbacks falls within the safe-harbor provision of 42 C.F.R. § 1001.952 because the payments were to employees of LTC and Professional. Luis further argues that there is no evidence of a violation of 18 U.S.C. §§ 1347, 1349 because the Medicare certifications she signed were submitted before the alleged kickback scheme took place.

Additionally, Luis makes several other arguments challenging the entering of a preliminary injunction in this case. She argues that the application of § 1345 violates the *ex post facto* clause. Luis further argues that the Sixth Amendment requires the release of funds to pay attorney's fees and argues that the language of § 1345 does not permit the restraint of assets needed for attorney's fees. Each of these arguments is discussed below.

i. The payment of kickbacks in this case do not fall within the safe-harbor provisions of the Anti-kickback statute

Luis first contends that some of the payments made to nurse/patient recruiters do not violate the Anti-kickback statute, § 1320a-7b(b)(2)(B).[4] To support this position, she relies upon the "safe-harbor" provision contained in 42 C.F.R. § 1001.952, which provides:

As used in section 1128B of the Act, "remuneration" does not include any amount paid by an employer to an employee, who has a bona fide employment

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[4] Section 1320a-7b(b)(2)(B) provides:

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind –

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b)(2)(B).

relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.

42 C.F.R. § 1001.952. A similar safe-harbor provision is contained in the statute itself. That version of the safe-harbor provides that the prohibition against paying kickbacks will not apply to "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services." 42 U.S.C. § 1320a-7b(b)(3)(B).

Special Agent Warren's declaration indicates that CW1, CW2, CW3, and CW6 were employees of LTC, Professional, or both. Based on this, Luis argues that these individuals fall into the ambit of the safe harbor and contends that payments to them for recruiting patients were not improper. According to Luis, the safe-harbor will apply so long as "payments to them for referring patients [generated revenue] for services rendered and medically necessary." As such, Luis contends that $1,826,746 of revenue generated by payment patient referrals was not generated illegally. However, Luis misinterprets the scope of the safe-harbor provisions.

For either safe-harbor provision to apply, the remuneration must have been made to the employee for furnishing or providing covered items or services or for items or services payable under Medicare. This is evident from the text of the safe-harbor provisions,

as well as the Eleventh Circuit's decision in *United States v. Starks,* 157 F.3d 833 (11th Cir.1998). The text of the safe-harbor provision upon which Luis relies states that "remuneration" does not include "any amount paid by an employer to an employee *in the furnishing* of any item or service for which payment may be made in whole or in part under Medicare." 42 C.F.R. § 1001.952 (emphasis added). Similarly, the safe harbor contained in § 1320a-7b states that it will apply to "any amount paid by an employer to an employee *for employment in the provision* of covered items or services." § 1320a-7b(b)(3)(B) (emphasis added). The emphasized language in both of these provisions makes clear that the safe-harbor provisions will only apply when payments made to an employee compensate the employee for furnishing or providing covered items or services or items or services payable by Medicare, not simply for referring patients.

This was also the Eleventh Circuit's view in *Starks,* 157 F.3d at 839, where the court considered a vagueness challenge to the employee safe-harbor provisions. In that case, two individuals (Angela Starks and Barbara Henry) were paid for referring patients to Future Steps, Inc, which was a "corporation that developed and operated treatment programs for drug addiction." *Id.* at 835. Although Starks and Henry referred patients, they did not personally provide any medical services. *Id.* at 835-36. Starks, Henry, and Andrew Siegel, the owner of Future Steps, were convicted of violations of the Anti-kickback

statute. *Id.* at 837. Starks and Siegel appealed their convictions, arguing that the safe-harbor provision contained in § 1320a-7b is unconstitutionally vague. *Id.* at 839. Rejecting this argument, the court found that, even if Starks and Siegel believed they were bona fide employees, the safe-harbor was not vague, as applied, because Starks and Henry were not compensated for providing "covered items or services." *Id.; see also United States v. Borrasi,* 639 F.3d 774, 782 (7th Cir.2011) (finding as long as some portion of a payment is for referrals, the safe-harbor provisions will not apply).

Here, Special Agent Warren's declaration states that CW2, CW3, and CW6 were paid for recruiting patients.[5] Even if these patients ultimately received legitimate medical care, payments to these nurse/recruiters for referring patients to LTC and Professional violate the Anti-kickback statute. Therefore, it is irrelevant whether the nurses were bona fide employees paid for "covered items or services" because the payments to them were, at least in part, for their illegal patient referrals.

Furthermore, even if Luis's view of the scope of the safe harbor provisions were correct, her contention that the patients, who were referred by these CWs, received medically necessary services is dubious.

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[5] Although Luis refers to CW1 when making this argument, CW1 was not a patient recruiter and, therefore, is not relevant to her argument.

According to the declaration, after patient recruiters were compensated for referring patients, "LTC and Professional would then fraudulently bill Medicare for home health services that were not medically necessary or were never provided." For this additional reason, the safe-harbor provisions do not apply here.

ii. There is probable cause to establish a knowing misrepresentation to Medicare sufficient to constitute violations of 18 U.S.C. §§ 1347, 1349

Luis further argues that there is not sufficient evidence to find that there has been a knowing misrepresentation sufficient to amount to a violation 18 U.S.C. §§ 1347, 1349[6] and, therefore, the Government cannot establish "Federal health care offenses" to restrain her assets under § 1345. To support this argument, Luis argues that a violation of §§ 1347, 1349 requires her to submit a representation that she

---

[6] Section 1347 provides, in pertinent part:

> (a) Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program.

18 U.S.C. § 1347. Section 1349 makes conspiracy to violate § 1347 a crime. *See* 18 U.S.C. § 1349.

will comply with Medicare rules *during* the period of time she submits improper Medicare claims. This argument fails because, as discussed below, all that is required is that a certification of compliance be submitted *at some point before* a non-complying claim is knowingly submitted. That requirement is satisfied here.

Luis's [sic] erroneously relies upon *United States v. Medina*, 485 F.3d 1291 (11th Cir.2007). One issue considered in *Medina* was whether there was sufficient evidence of health care fraud to sustain convictions against four individuals who were convicted for violations of § 1347. *Id.* at 1295. The court first found that a conviction under § 1347 requires the defendant make a "knowing false or fraudulent representation to Medicare." *Id.* at 1298. The court then found that, as to one of the defendants, her conviction for violation of § 1347 that was based on claims submitted before she signed Medicare provider applications (agreeing to abide by Medicare rules) should be reversed because there was no evidence of a knowing, false representation. *Id.* at 1298. However, the convictions that were based on kickback tainted claims that were submitted after she signed Medicare provider applications were upheld. *Id.* As to those counts, there was sufficient evidence to sustain the convictions because the defendant made a knowing false or fraudulent representation to Medicare by signing the provider applications, promising to comply, and then knowingly submitted tainted claims to Medicare. *Id.*

In this case, Luis acknowledged that she signed Medicare enrollment applications in 2003, 2004, and 2005 and, by doing so, certified that she would abide by Medicare law. There is evidence that she later submitted claims that violated the law, including the Anti-kickback provision. Under *Medina,* it does not matter that the representations in certifications were made several years before the claims were submitted. All that is required is that there is a representation that one will comply with Medicare law followed by a knowingly non-compliant claim. Therefore, by allegedly submitting non-compliant claims to Medicare after signing the applications, the knowledge requirement of § 1347 and § 1349 is satisfied for purposes of § 1345.

Luis makes an additional argument that the Government must demonstrate the United States suffered a "loss" to restrain assets under § 1345. In Luis's view, despite the payment of kickbacks, the United States does not suffer a loss as long as medically necessary services are performed. This argument fails because § 1345 does not require the United States to suffer a loss. All that is necessary is that a person is "alienating or disposing of property, or intends to alienate or dispose of property" that is "obtained as a result of a Federal health care offense. " § 1345.

iii. The application of § 1345 to this case does not violate the ex post facto clause

Luis further argues that the *ex post facto* clause, contained in Article I, Section 9 of the U.S. Constitution, prohibits § 1345 from applying here. Luis points out that the statutory term "Federal health care offense" did not include payment of kickbacks until March 23, 2010. *See* 18 U.S.C. § 24 (prior to 2010 amendment). Therefore, § 1345 did not authorize the restraint of assets based upon payment of kickbacks until that date. Luis argues that because the Government's proffer of evidence relates solely to kickbacks that occurred before March 2010, restraint of assets is not permitted.

However, even assuming that the *ex post facto* clause is implicated by § 1345, Luis's argument is fundamentally flawed. The prior version of § 24, which defines the term "Federal health care offense," included violations of the general conspiracy statute, 18 U.S.C. § 371. *Id.* A violation of § 371 was included in the definition of Federal health care offense to the extent that the crime involved "a health care benefit program." *Id.* The term "health care benefit program" was defined as "any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract." *Id.* Accordingly, under the older version of the statute, a conspiracy

to pay kickbacks to receive benefits under Medicare in violation of § 371 was a Federal health care offense and could properly result in an injunction under § 1345. *See id.*

Here, the indictment charges Luis with a count for conspiracy to pay kickbacks in violation of § 371. In addition to establishing probable cause to believe the Anti-kickback statute has been violated, the evidence before the Court is sufficient to establish probable cause to believe that § 371 has been violated and resulted in $45 million of improper Medicare benefits being paid. Thus, even under the older version of § 24, an injunction could be entered under § 1345 for violation of § 371. As such, there is no *ex post facto* issue.

iv. The Sixth Amendment does not prohibit the restraint of substitute, "untainted" assets

Luis also argues that the Sixth Amendment guarantees her a right to use assets that are not traceable to Federal health care offenses to select and retain counsel of her choice for her defense in the parallel criminal case. The Government's argument is that regardless of whether or not assets were obtained legitimately, there is no Sixth Amendment impediment to the assets being frozen as long as a statute permits restraint of substitute assets. According to the Government, because § 1345 allows substitute, untainted assets to be restrained, Luis has no

Sixth Amendment right to use the assets to hire counsel of her choice.

It is undisputed that "an element of [the Sixth Amendment right to counsel] is the right of a defendant who does not require appointed counsel to choose who will represent him." *United States v. Gonzalez-Lopez,* 548 U.S. 140, 144, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). Indeed, "[t]he Sixth Amendment comprehends a qualified right to select and be represented by counsel of choice because 'were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.'" *Bissell,* 866 F.2d at 1351 (quoting *United States v. Koblitz,* 803 F.2d 1523, 1528 (11th Cir.1986)). However, this qualified right does not permit a criminal defendant to use assets that are the proceeds of criminal activity to retain counsel. *Caplin & Drysdale, Chartered v. United States,* 491 U.S. 617, 626, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); *Bissell,* 866 F.2d at 1351. This is so because "[a] defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those assets are the only way that that defendant will be able to retain the attorney of his choice." *Caplin,* 491 U.S. at 626, 109 S.Ct. 2646.

The more difficult question is the one presented here. That is, whether a criminal defendant has a Sixth Amendment right to use untainted, substitute assets to retain counsel of choice. Although the answer

to this question is far from clear, the Fourth Circuit's opinion in *In re Billman*, 915 F.2d 916, 921 (4th Cir.1990) supports the Government's position. In *Billman*, a defendant was charged with racketeering and a forfeiture count, and the defendant then transferred some of the assets to another person. *Id.* at 918. The district court found that the assets that were transferred could not be directly linked to the racketeering, and the circuit court determined that it was bound to accept this finding. *Id.* As such, they were "substitute" assets. *Id.* at 920. The transferee argued that she had a Sixth Amendment right to use the funds to retain counsel of her choice. *Id.* at 921-22. The court rejected this argument because the substitute assets were subject to restraint under § 1963. *Id.* Therefore, the *Billman* court's view is that there is no Sixth Amendment impediment to the seizure of substitute assets pursuant to the statute because those assets are "contraband," even if they were not the proceeds of criminal activity. *Id.* at 922; *see also United States v. Am. Therapeutic Corp.*, 797 F.Supp.2d 1289, 1293-94 (S.D.Fla.2011) (finding no Sixth Amendment right to use untainted, substitute assets that are restrained under § 1345).

This view is common sense. An example by the Fourth Circuit that was related by the *Bissell* decision is instructive:

> Suppose a bank is robbed and $100,000 taken. A defendant is arrested in possession of $100,000 and nothing more. The defendant protests his innocence and claims, without

> the slightest proof, that the $100,000 was in fact a gift from a friend. Surely no one will contend that the $100,000 must be made available to pay the defendant's lawyer, and not be kept available for return to the bank in the event the defendant is found guilty.

Bissell, 866 F.2d at 1351 (quoting *In re Forfeiture Hearing As to Caplin & Drysdale, Chartered*, 837 F.2d 637, 645 (4th Cir.1988), *aff'd sub nom., Caplin*, 491 U.S. 617, 109 S.Ct. 2646).

The reason the bank robber is not permitted to use the $100,000 to hire a lawyer is obvious. The money does not belong to him. But suppose the bank robber in the example above spent the $100,000 that he stole. It just so happens, however, that he has another $100,000 that he obtained legitimately. Should his decision to spend the $100,000 he stole mean that he is free to hire counsel with the other $100,000 when Congress has authorized restraint of those substitute assets? The reasonable answer is no. The bank has the right to have those substitute, untainted assets kept available for return as well. Therefore, in accord with the Fourth Circuit's view, the most reasonable conclusion is that there is no Sixth Amendment right to use untainted, substitute assets to hire counsel.

v. Section 1345 allows for the restraint of assets that would otherwise be used for payment of attorney's fees

Luis also argues that the purpose of § 1345 is to insure that the defendant is not wasting or hiding assets, not to punish the defendant. As such, she argues that assets that will be used for attorney's fees should not be restrained. To the extent that Luis is arguing that the statute does not permit such assets to be restrained, this argument fails. However, the Court does have discretion to release assets for payment of attorney's fees.

In exercising its discretion for release of assets for payment of attorney's fees, the Court should consider whether the defendant is able to afford representation in the § 1345 proceedings. *See United States v. Speqtrum, Inc.*, No. CIV. A. 10-2111 JEB, 2012 WL 517526, at *2 (D.D.C. Feb. 16, 2012); *United States v. Jaime*, No. 2:10-CV-00498, 2011 WL 145196, at *1-2 (S.D.W.Va. Jan. 18, 2011). If "restrained property is a defendant's only means of securing counsel" the Court may wish to exercise its discretion to release assets to secure counsel. *See Speqtrum, Inc.*, 2012 WL 517526, at *2. In this case, Luis was represented throughout the § 1345 proceedings by competent counsel. Therefore, this consideration is no longer relevant. In the criminal prosecution, Luis will be appointed counsel if she cannot afford representation.

C. Conclusion

For the foregoing reasons, the Government's Motion for a Preliminary Injunction under 18 U.S.C. § 1345 [D.E. # 4] is GRANTED. The preliminary injunction order will be entered shortly. Luis's Motion to Modify the Restraining Order to Release Assets for the Defense of the Related Criminal Case [D.E. # 46] is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-13719-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SILA LUIS,

Defendant-Appellant,

ELSA RUIZ, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Jul. 9, 2014)

BEFORE: MARTIN, DUBINA and SENTELLE,* Circuit Judges.

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* Honorable David Bryan Sentelle, United States Circuit Judge for the District of Columbia Circuit sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
MAR 30 2015
OFFICE OF THE CLERK

No. 14-419

In the Supreme Court of the United States

SILA LUIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the pretrial restraint of forfeitable substitute assets allegedly needed to retain counsel of choice violates the Fifth or Sixth Amendment.

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In the Supreme Court of the United States

No. 14-419

SILA LUIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 564 Fed. Appx. 493. The order of the district court (Pet. App. 8-34) is reported at 966 F. Supp. 2d 1321.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2014. A petition for rehearing was denied on July 9, 2014 (Pet. App. 35-36). The petition for a writ of certiorari was filed on October 7, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a hearing in the United States District Court for the Southern District of Florida, the district

court entered a preliminary injunction restraining petitioner's assets pursuant to 18 U.S.C. 1345. See Pet. App. 4-34. The court of appeals affirmed. See *id.* at 1-3.

1. a. Criminal forfeitures are imposed "primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct." *United States* v. *Ursery*, 518 U.S. 267, 284 (1996); see *Libretti* v. *United States*, 516 U.S. 29, 39 (1995); see also *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014) (explaining that "[f]orfeitures help to ensure that crime does not pay" and are used "to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities"). Such forfeitures are "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti*, 516 U.S. at 39.

Section 853(a) of Title 21, enacted in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, requires "forfeit[ure] to the United States" of "any property constituting, or derived from, any proceeds [a] person obtained, directly or indirectly, as a result of" specified drug offenses, or "any of the person's property used, or intended to be used, * * * to commit, or to facilitate the commission of," such offenses. 21 U.S.C. 853(a)(1)-(2). If "as a result of any act or omission of the defendant" any such forfeitable property cannot be located or has been transferred or placed beyond the jurisdiction of the district court, Section 853(p) mandates the forfeiture of substitute assets—that is, of "any other property of the defendant, up to the value of any [forfeitable] property" that the defendant has hidden or dissipated. 21 U.S.C. 853(p)(1)-(2).

Section 853 also establishes various forfeiture-related procedures. *Inter alia*, Section 853 authorizes a district court to enter a pretrial order "preserv[ing] the availability of property described in subsection (a) of this section for forfeiture," so that the property is not dissipated before a conviction. 21 U.S.C. 853(e)(1).

The provisions of Section 853 apply to the forfeiture of property under other criminal statutes as well. See 28 U.S.C. 2461(c). For instance, 18 U.S.C. 982 provides that a court imposing sentence "on a person convicted of a Federal health care offense" shall "order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." 18 U.S.C. 982(a)(7).[1] Section 982 also provides that "[t]he forfeiture of property under this section * * * shall be governed by the provisions of" Section 853. 18 U.S.C. 982(b)(1); see 18 U.S.C. 982(b)(2) (stating that Section 853(p), governing substitute assets, shall not be used with respect to certain defendants who acted merely as intermediaries in committing money-laundering offenses); see also 28 U.S.C. 2461(c).

b. Special civil procedures apply when a person is "committing or about to commit a Federal health care offense" or is "alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of * * * a Federal health care offense or

---

[1] See 18 U.S.C. 24(a) (defining "Federal health care offense" to include, *inter alia*, conspiracy to commit health care fraud (in violation of 18 U.S.C. 1349), conspiracy to defraud the government in relation to a health care program (in violation of 18 U.S.C. 371), and paying kickbacks in connection with a federal health care program (in violation of 42 U.S.C. 1320a-7b(b)(2)(A))).

property which is traceable to such a violation." 18 U.S.C. 1345(a)(1)-(2). If a person is engaging in those acts, the government may commence a civil action to enjoin the commission of the offense and to restrain "any such property or property of equivalent value." 18 U.S.C. 1345(a)(2)(A)-(B). By preserving for later forfeiture or restitution either assets that are directly linked to the federal health care offense or assets "of equivalent value," such an injunction "prevent[s] a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought." 18 U.S.C. 1345(a)(2)(B)(i) and (b).

2. On October 2, 2012, a grand jury issued a sealed indictment charging petitioner and two co-defendants with conspiracy to commit health care fraud, in violation of 18 U.S.C. 1349; conspiracy to pay kickbacks in contravention of Medicare rules, in violation of 18 U.S.C. 371; and paying kickbacks in connection with a federal health care benefit program, in violation of 42 U.S.C. 1320a-7b(b)(2)(A). See Indictment 7-14. The indictment alleges that those "offenses resulted in $45 million of improper Medicare benefits being paid." Pet. App. 12; see Indictment 9. The indictment seeks forfeiture under 18 U.S.C. 982 of specified property "derived * * * from gross proceeds traceable to the commission of the offense" or assets of equivalent value. Indictment 14-16; see Pet. App. 12. Petitioner has not yet been arraigned.[2]

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[2] Petitioner's two co-defendants have cooperated, pleaded guilty, and been sentenced. See 12-cr-20751 Docket entry Nos. 149, 158, 212. The district court ordered one of them to pay $27 million in restitution and the other to pay $45 million in restitution. See *ibid.*

3. a. On the same day the grand jury returned the indictment, the government filed this civil action under Section 1345, seeking to enjoin petitioner from committing further acts of health care fraud and to restrain her assets. See 12-cv-23588 Docket entry No. (Docket entry No.) 1, at 1, 19-20. The government then filed a motion for a temporary restraining order, explaining that "[t]he government has thus far identified losses to federal health care programs of over $45 million stemming from a scheme, implemented through an elaborate web of kickbacks, to submit fraudulent claims for home health services that were neither performed nor medically necessary." Docket entry No. 4, at 1.

In support of that motion, the government submitted a declaration from a case agent explaining how petitioner had carried out her fraudulent scheme. See Docket entry No. 5, at 1-2. Petitioner and her co-defendants owned and operated two home health care agencies, LTC Professional Consultants, Inc., and Professional Home Care Solutions, Inc., which allegedly served diabetic patients entitled to multiple daily home visits to receive insulin injections. See *id.* at 1-2, 7-8. Each of those agencies was an enrolled health care provider with Medicare, see *ibid.*, a federal program that prohibits payment of kickbacks or referral fees to doctors, nurses, health care aides, patient recruiters, and patients, see 42 U.S.C. 1320a-7b(b)(2)(A); 42 C.F.R. 1001.1 *et seq.* The case agent's declaration stated that, despite that prohibition, petitioner had paid kickbacks to nearly everyone associated with her agencies. See Docket entry No. 5, at 5, 9-10. Those kickbacks had gone to nurses who falsified blood sugar readings, patient visit logs, and treatment

notes, see *id.* at 11-14; to recruiters who sought out Medicare beneficiaries who were not actually in need of home health care visits, see *id.* at 13-18; and to beneficiaries who allowed their information to be used to bill Medicare for services that were not needed and were never provided, see *id.* at 14. From 2006 to 2012, petitioner's companies received $45 million from Medicare. See *id.* at 9-10.

On October 3, 2012, the district court entered a temporary restraining order granting the relief that the government had requested. See Docket entry No. 11, at 1-7 (identifying specific restrained assets). After the indictment was unsealed, petitioner moved to release funds from the restraining order to pay her attorney in the criminal case. See Docket entry No. 46, at 1-4. She claimed that the restraint constituted a violation of her Sixth Amendment rights, alleging that without those funds she could not hire her counsel of choice. See *id.* at 4, 8-13.

The district court held an evidentiary hearing at which the government's case agent testified and was cross-examined at length. See Docket entry No. 135. Petitioner and the government stipulated for purposes of the hearing that "an unquantified amount of revenue not connected to the indictment flowed into some of the accounts and some of the real estate" that had been restrained. *Id.* at 90.

After considering the evidence, the district court denied petitioner's motion for release of funds and converted the temporary restraining order into a preliminary injunction barring petitioner from disposing of "proceeds or profits from [her] Federal health care offenses or property of an equivalent value" in which she has an interest. Pet. App. 6-7; see *id.* at 34.

The court found probable cause "to believe that: (1) Federal health care offenses have been committed; (2) $45 million was obtained illegally as a result of those offenses; and (3) * * * there has been a dissipation of those monies," which were used "to purchase luxury items, real estate, automobiles, and for travel." *Id.* at 14-15; see *id.* at 15 n.3 (stating that, "[e]ven under [a] preponderance standard, the Government has carried its burden of proof to enter an injunction restraining at least $40.5 million"). The court also rejected petitioner's Sixth Amendment argument, agreeing with the Fourth Circuit's view that "there is no Sixth Amendment impediment" to the restraint of "substitute assets" not directly tied to the commission of the offense so long as those assets are forfeitable by statute. *Id.* at 31 (citing *In re Billman*, 915 F.2d 916, 921-922 (4th Cir. 1990), cert. denied, 500 U.S. 2258 (1991)).

b. The court of appeals affirmed. Pet. App. 1-3. The court held that petitioner's Sixth Amendment challenge was "foreclosed by the United States Supreme Court decisions in *Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631 (1989); [and] *United States v. Monsanto*, 491 U.S. 600, 616, (1989)." Pet. App. 3 (parallel citations omitted); see *ibid.* (noting that the district court had found, based on an evidentiary hearing, that there was probable cause "to believe that [petitioner] committed an offense requiring forfeiture, that she possessed forfeitable assets, and that she was alienating those assets"). The court also cited (see *ibid.*) its own prior decision in *United States* v. *DBB, Inc.*, 180 F.3d 1277 (11th Cir. 1999), which had held that Section 1345 permits entry of a prelimi-

nary injunction restraining the dissipation of substitute assets, see *id.* at 1283-1284.

ARGUMENT

Petitioner contends that the preliminary injunction authorized by Section 1345 violates her Fifth and Sixth Amendment rights because pretrial restraint of substitute assets is never permissible when a defendant seeks to use those assets to hire her counsel of choice. The court of appeals correctly rejected that argument, and its unpublished decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. a. This Court's decisions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, 491 U.S. 600 (1989), establish that a statutorily authorized restraint on a defendant's assets does not violate the Constitution if the government has shown probable cause to believe that those assets are forfeitable.

In *Caplin & Drysdale*, the Court considered whether refusal to "authoriz[e] the payment of attorney's fees" out of assets forfeitable as a result of the defendant's conviction infringed the defendant's Sixth Amendment right to counsel of choice or "upset[] the 'balance of power' between the Government and the accused in a manner contrary to the Due Process Clause of the Fifth Amendment." 491 U.S. at 622, 624. The Court recognized that, without access to forfeitable assets, a defendant sometimes "will be unable to retain the attorney of his choice." *Id.* at 625. The Court nevertheless rejected the defendant's constitutional challenge, explaining that "[a] defendant has no Sixth Amendment right to spend another person's money" for legal fees, including money that is "for-

feitable" by statute. 491 U.S. at 626; see *Kaley* v. *United States*, 134 S. Ct. 1090, 1096-1097 (2014). The Court in *Caplin & Drysdale* concluded that the "strong governmental interest in obtaining full recovery of all forfeitable assets" trumps "any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." 491 U.S. at 631.

In *Monsanto*, the Court considered Fifth and Sixth Amendment claims arising from a *pretrial* restraint of assets that the government alleged would be forfeitable upon conviction. Relying on *Caplin & Drysdale*, the Court held that "assets in a defendant's possession may be restrained" even "before he is convicted," based on "a finding of probable cause to believe that the assets are forfeitable," regardless of whether "the defendant seeks to use those assets to pay an attorney." *Monsanto*, 491 U.S. at 602, 615; see *Kaley*, 134 S. Ct. at 1096-1097. The Court reasoned that, "if the Government may, post-trial, forbid the use of forfeited assets to pay an attorney, then surely no constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." 491 U.S. at 616.

b. As the court of appeals correctly held, those decisions are controlling here. As petitioner points out (Pet. 17-18), in both *Caplin & Drysdale* and *Monsanto* the government had sought to forfeit only assets that were directly involved in or traceable to the defendant's crimes. See *Caplin & Drysdale*, 491 U.S. at 619-620; *Monsanto*, 491 U.S. at 602-603. In both cases, however, the Court repeatedly recognized that the relevant characteristic of the assets was not that they

were "tainted" by the crime (*e.g.*, Pet. i), but simply that they were forfeitable by statute. See, *e.g.*, *Caplin & Drysdale*, 491 U.S. at 625-629, 632; *Monsanto*, 491 U.S. at 614-616. *Monsanto*'s holding about the constitutionality of pretrial asset restraint has nothing to do with the specific statutory basis for deeming particular assets to be forfeitable. Rather, the Court held that a pretrial restraint is permissible, even in the face of a claim that the restrained assets are needed to pay for counsel, so long as there is "probable cause to believe that the assets are forfeitable." 491 U.S. at 615; see *Kaley*, 134 S. Ct. at 1095 (describing *Monsanto* as establishing that "a pre-trial asset restraint [is] constitutionally permissible whenever there is probable cause to believe that the property is forfeitable"); *id.* at 1096-1097.

Thus, "the key distinction for determining whether pretrial restraint of property violates a defendant's Sixth Amendment right is not whether the property is *tainted* or *untainted*, but rather whether it is *forfeitable* or *nonforfeitable*." *United States* v. *Wingerter*, 369 F. Supp. 2d 799, 810 (E.D. Va. 2005). When the government claims that property is forfeitable because it is directly involved in the defendant's crime, then forfeitability turns on an inquiry into whether that property is "tainted"—that is, whether it was used in the crime or is the proceeds of the crime. But when the government claims that property is forfeitable as substitute assets because the defendant has already spent or hidden the proceeds of the crime, then the forfeitability inquiry does not turn on any question of "taint"; it depends on different questions, such as whether proceeds have actually been dissipated and whether the value of the substitute assets

exceeds the value of the dissipated assets. See 21 U.S.C. 853(p).

Here, the unchallenged factual finding of the district court is that probable cause exists to believe that the substitute assets at issue are forfeitable based on proof that petitioner committed federal health care offenses and then dissipated the proceeds of those offenses by spending them on luxury items and travel. See 18 U.S.C. 982(a)(7) and (b); 18 U.S.C. 1345; 21 U.S.C. 853(p); see also *Monsanto*, 491 U.S. at 615. *Monsanto*'s holding is thus fully applicable, and petitioner's desire to spend the substitute assets to hire counsel does not trump the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Caplin & Drysdale*, 491 U.S. at 631; see *Kaley*, 134 S. Ct. at 1094-1095.

Petitioner says little to counter that conclusion. She suggests (*e.g.*, Pet. 21) that, as a policy matter, it is "inconceivable" that she may not use "her own legitimately-earned assets to retain counsel."[3] But if petitioner's position were adopted, then a defendant could effectively deprive her victims of any opportunity for compensation simply by dissipating her ill-gotten gains. It is precisely to avoid that result that Congress provided for the pretrial restraint of substitute assets in cases like this one, thus ensuring protection of the government's interests in providing restitution to victims and in recovering forfeitable assets for other purposes. See *Kaley*, 134 S. Ct. at 1094-1095;

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[3] Petitioner's discussion of the history of civil forfeiture law (see Pet. 20-21) has no bearing on the question presented in this case. As petitioner acknowledges (Pet. 21), *in personam* forfeiture —the type of forfeiture at issue in both *Caplin & Drysdale* and *Monsanto*—is a well-recognized penalty in criminal cases.

see also 18 U.S.C. 1345(b) (specifically authorizing restraint of assets, including "property of equivalent value" to tainted assets, "as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought").

Petitioner also contends that *Caplin & Drysdale* and *Monsanto* do not apply to substitute assets because the relation-back doctrine, under which the government's interest in forfeitable property relates back to the date of the criminal offense, "does not apply to untainted assets." Pet. 19. Petitioner is incorrect. It is matter of some debate whether Section 853(c), which provides for relation back as a statutory matter, applies to substitute assets. See, *e.g.*, *United States* v. *McHan*, 345 F.3d 262, 272 (4th Cir. 2003). That debate is closely tied to a disagreement (not relevant in this Section 1345 case) about whether Section 853 provides for pretrial restraint of substitute assets. See, *e.g.*, *United States* v. *Peterson*, 820 F. Supp. 2d 576, 584-585 (S.D.N.Y. 2011); pp. 15-16, *infra*. But the analysis in this Court's decisions—and, in particular, in *Monsanto*, which governs pretrial restraint of forfeitable assets—does not turn on application of the relation-back doctrine. See *Monsanto*, 491 U.S. at 615-616; see also *Caplin & Drysdale*, 491 U.S. at 625-633. The government's interests in recovering forfeitable property "override[] any Sixth Amendment interest," *Caplin & Drysdale*, 491 U.S. at 631, regardless of whether a particular statutory provision states that the government's right to that property vests retroactively.

Finally, petitioner argues (Pet. 22-23) that the government made a concession in *Kaley* that is relevant

to the question presented here. At oral argument in *Kaley*, counsel for the government "agreed that a defendant has a constitutional right to a hearing on" the question "whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment"—a matter that the Court described as a "requirement[] for forfeiture under federal law." 134 S. Ct. at 1095 & n.3. That statement does not undermine the conclusion that *Monsanto* controls this case.

In *Kaley*, the government had sought and obtained a pretrial order restraining under Section 853(e) only directly forfeitable assets—that is, "proceeds obtained from" or involved in "the [charged] offense(s) and all property traceable to such property." *Kaley* J.A. 40; see *id.* at 44-47, 67-68; *United States* v. *Kaley*, No. 07-80021-CR, 2007 WL 1831151, at *1-2 (S.D. Fl. 2007) (stating that, "[b]ecause there exists probable cause to believe that the property in question was 'involved in' money laundering activity or is 'traceable to such property,' the protective order has been properly entered"). As noted above, when the government claims entitlement to forfeiture of such assets and no others, traceability or other direct relation to the crime is indeed a "requirement[] for forfeiture." *Kaley*, 134 S. Ct. at 1095. In that situation, if the government obtains a restraint on a bank account or other asset that the defendant contends is not directly forfeitable, then the defendant is entitled to a hearing on that question if he lacks other funds to retain counsel. See *ibid.* (noting that the courts of appeals have "uniformly" allowed such a hearing); *id.* at 1099 n.9.

Thus, government counsel in *Kaley* conceded only that a defendant is entitled to a hearing on traceabil-

ity when that is the rationale invoked by the government in support of a pre-trial restraint. By contrast, in a case (like this one) where a restraint on substitute assets is authorized by Section 1345, a defendant cannot defeat the restraint by showing that the property is not "tainted," because the property is forfeitable even in the absence of any taint. At most, a defendant might be able to show at a hearing that a restraint on substitute assets is improper because some statutory "requirement[] for forfeiture" of such assets, *Kaley*, 134 S. Ct. at 1095, cannot be satisfied. See, *e.g.*, *United States* v. *Patel*, 888 F. Supp. 2d 760, 771 (W.D. Va. 2012) (stating in a case involving pretrial restraint on substitute assets that the defendant was entitled to challenge at a hearing whether probable cause existed to believe that the government would be able to satisfy the requirements set forth in Section 853(p) for substitute-asset forfeiture).

2. The unpublished decision below does not conflict with any decision of this Court or of another court of appeals. Indeed, the government is not aware of any case in which a court has expressed doubt about the constitutionality of Section 1345 or has recognized (after *Caplin & Drysdale* and *Monsanto*) a constitutional right to use assets forfeitable by statute—including forfeitable substitute assets—to hire counsel.

a. Contrary to petitioner's contention (Pet. 25-26 & n.8), the decision below does not conflict with the Fourth Circuit's decision in *United States* v. *Farmer*, 274 F.3d 800 (2001).

The defendant in *Farmer* was charged with a scheme involving counterfeit merchandise, and the government seized (pursuant to civil forfeiture stat-

utes) 3000 boxes of the merchandise as well as motor vehicles and $540,000 in cash and cashier's checks. See 274 F.3d at 801. The indictment alleged that the seized items were "subject to forfeiture as either *instruments or proceeds* of [defendant's] alleged trademark and money laundering violations"—that is, that they were directly forfeitable. *Id.* at 802 (emphasis added). The court of appeals held that the defendant was entitled to a hearing "for the limited purpose of determining whether untainted assets have been seized and whether [defendant] requires those assets to hire counsel." *Id.* at 801. Given the theory of forfeiture on which the government had proceeded, the court's distinction between tainted and untainted assets was simply a means of distinguishing between assets that were ultimately subject to forfeiture and those that were not. See *id.* at 802 (stating that this Court has held that "any Sixth Amendment right to obtain counsel of choice does not extend beyond the individual's right to spend his own legitimate, nonforfeitable assets"); see also *Wingerter*, 369 F. Supp. 2d at 810.

The court in *Farmer* did not discuss whether substitute assets may be frozen pending trial when the defendant asserts that those assets are needed to pay for counsel.[4] But the Fourth Circuit—the sole court of

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[4] That question likewise is not addressed in any of the court of appeals decisions cited by amicus Associations of Criminal Defense Attorneys (at 19-20), which deal with the more general question whether a defendant may obtain a hearing with respect to a pretrial asset freeze. The decision identified by amicus U.S. Justice Foundation (at 16) as conflicting with the decision below is similarly irrelevant. In that case, the Sixth Circuit interpreted a now-superseded version of Section 1345(a)(2), the subsection that permits restraint of "property of equivalent value," to cover only

appeals to have held that the pretrial restraint of substitute assets is permissible under Section 853(e), see Pet. 7 n.1—has repeatedly upheld such restraints without suggesting that they create any constitutional problem. See *In re Billman*, 915 F.2d 916, 919, 921-922 (4th Cir. 1990), cert. denied, 500 U.S. 2258 (1991); *United States* v. *Bollin*, 264 F.3d 391, 421-422 (4th Cir.), cert. denied, 524 U.S. 935 (2001) and 535 U.S. 989 (2002); *United States* v. *Bromwell*, 222 Fed. Appx. 307, 311 (4th Cir. 2007) (per curiam).[5] And numerous district courts in the Fourth Circuit have permitted pretrial restraints of substitute assets in the face of the very constitutional challenge that petitioner raises here. See, *e.g.*, *Wingerter*, 369 F. Supp. 2d at 810; *In re Restraint of Bowman Gaskins Fin. Grp. Accounts*, 345 F. Supp. 2d 613, 627-628 (E.D. Va. 2004); *United States* v. *Helms*, No. 700CR00074, 2001 WL 1057751, at *2 (W.D. Va. 2001); see also *United States* v. *Ziadeh*, 230 F. Supp. 2d 702, 704 (E.D. Va. 2002).[6]

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cases involving banking-law violations. See *United States* v. *Brown*, 988 F.2d 658, 663-664 (6th Cir. 1993).

[5] Indeed, the district court in this case understood itself to be following the same approach that the Fourth Circuit has taken. See Pet. App. 31 (discussing *In re Billman*).

[6] Petitioner cites (Pet. 27) *United States* v. *Najjar*, 57 F. Supp. 2d 205 (D. Md. 1999), for the proposition that a substitute asset should not be restrained in the face of a claim that the asset is needed to pay counsel. To the extent that *Najjar* rests on the proposition that forfeiture of substitute assets is discretionary, see *id.* at 208-209, it is not good law. See *United States* v. *Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("Section 853(p) is not discretionary; rather, the statute mandates forfeiture of substitute assets when the tainted property has been placed beyond the reach of a forfeiture.") (internal quotation marks omitted); see also *United States* v. *Patel*, 949 F. Supp. 2d 642, 662 n.18 (W.D. Va. 2013).

b. Petitioner suggests that the decision below is inconsistent with this Court's decision in *Kaley*. See, *e.g.*, Pet. 25. In *Kaley*, the Court held that a criminal defendant seeking to lift a pretrial restraint on her property in order to pay counsel of her choice is not "constitutionally entitled" to a hearing "to contest a grand jury's prior determination of probable cause to believe [she] committed the crimes charged." 134 S. Ct. at 1094. The Court's holding rested on the "fundamental and historic commitment of our criminal justice system" to entrust grand juries with that probable-cause determination, *id.* at 1097, as well as on an assessment that the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), would (if applicable) tip against affording the further process that the defendant sought, see 134 S. Ct. at 1100-1104.

Here, petitioner does not seek any additional process to contest the preliminary injunction entered by the district court under Section 1345. Indeed, that court has already afforded petitioner a thorough hearing at which she cross-examined the government's case agent and disputed the existence of probable cause to believe that she had committed a federal health care offense. See Pet. App. 16-20; see also *Kaley*, 134 S. Ct. at 1094; *Dowling* v. *United States*, 493 U.S. 342, 352 (1990). Rather, petitioner's claim is that the Constitution bars pretrial restraint of substitute assets in every case in which the defendant needs funds to pay for counsel. *Kaley* offers no support for such a rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

The Government asserts that the question presented has already been decided by this Court – that in the 1989 companion cases of *United States v. Monsanto*, 491 U.S. 600 (1989) and *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989), this Court held that the pretrial restraint of a criminal defendant's *untainted* assets needed to retain counsel of choice violates neither the Fifth nor Sixth Amendments. BIO 8-10. That proclamation is breaking news to the criminal defense bar, which, for the last 25-plus years, has understood those cases as having addressed exclusively the constitutionality of restraining *tainted* assets. *See* Amicus Brief of the Associations of Criminal Defense Attorneys at 3, 15. *Accord* Amicus Brief of the U.S. Justice Foundation at 17-19.[1]

The Government's position would also come as a surprise to the Justices who decided those cases. In *Caplin*, Justice White's majority opinion framed the issue in terms that made it clear that the Court's Sixth Amendment analysis differentiated between spending one's own money to retain counsel and spending stolen or tainted funds.

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[1] Even the district court in the instant case did not comprehend *Monsanto* and *Caplin* to have addressed the constitutionality of restraining so-called "substitute" assets. App. 30-31 ("[T]he answer to this question is far from clear . . ").

> Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond the individual's right to spend his own money to obtain the advice and assistance of counsel. A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.

491 U.S. at 626 (citations omitted).

Although candidly admitting that the facts of *Monsanto* and *Caplin* involved only the restraint of tainted assets, the Government asserts that the Court nonetheless implicitly addressed the restraint of substitute assets:

> In both cases, however, the Court repeatedly recognized that the relevant characteristic of the assets was not that they were "tainted" by the crime, but simply that they were forfeitable by statute. *Monsanto*'s holding about the constitutionality of pretrial asset restraint has nothing to do with the specific statutory basis for deeming particular assets to be forfeitable. Rather, the Court held that a pretrial restraint is permissible, even in the face of a claim that the restrained assets are needed to pay for counsel, so long as there is "probable cause to believe that the assets are forfeitable."

BIO 9-10 (citations omitted). Insofar as untainted assets are potentially "forfeitable" as substitute assets, the Government contends that this Court upheld the constitutionality of restraining untainted assets needed to retain counsel.

But when this Court used the term "forfeitable" in *Monsanto* and *Caplin*, this Court was referring exclusively to tainted assets. This Court cited 21 U.S.C. § 853(a) ("Property subject to criminal forfeiture") as the source statute "that authorizes forfeiture to the Government of 'property constituting, or derived from proceeds . . obtained' from" criminal activity. *Caplin*, 491 U.S. at 619-20. The Court never once cited 21 U.S.C. § 853(p) ("Forfeiture of substitute property"). Invoking the bank robber hypothetical, the Court posited that

> A robbery suspect, for example, has no Sixth Amendment right to use *funds he has stolen from a bank* to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the *robbery proceeds* and refuses to permit the defendant to use them to pay for his defense. [N]o lawyer, in any case, has the right to . . accept stolen property, or . . ransom money, in payment of a fee. The privilege to practice law is not a license to steal.

491 U.S. at 626 (citation and quotation omitted). *Caplin* cited the "relation-back" provision, 21 U.S.C.

§ 853(c), a codification of the "taint theory," as "dictat[ing] that 'all right, title and interest in *property' obtained by criminals via the illicit means* .. 'vests in the United States upon the commission of the act giving rise to forfeiture.'" *Id.* at 627. In describing the "the long-recognized and lawful practice of vesting title to any *forfeitable assets*," the Court specified "assets *derived from the crime*." 491 U.S. at 627-28 (emphasis added). Any reference in those cases to "forfeitable" assets was shorthand for tainted assets. *See also id.* at 630 ("'We reject any notion of a constitutional right to use *the proceeds of crime* to finance an expensive defense.'").

The Government cannot credibly suggest otherwise, given that its Briefs in *Monsanto* and *Caplin* invited the Court to use the terms "forfeitable," "forfeited" and "tainted" interchangeably:

> The fact that the forfeiture order reaches property even after its transfer (unless the property is in the hands of a bona fide purchaser) reflects an intention on the part of Congress to deter third parties from accepting *tainted assets* from the defendant for any purpose, even as part of a transaction that is otherwise lawful . .

Brief for the United States in *United States v. Monsanto*, No. 88-454, 1989 WL 1115135 at *20 (emphasis added).

> The property that Section 853 declares *forfeited* is not the funds that the defendant intends to use for a particular transaction –

> such as the payment of attorneys' fees – but instead all the defendant's *property that has been used in, or constitutes the proceeds of, his narcotics transactions.*. The statute forfeits the defendant's *drug-tainted property* without regard to the uses the defendant wishes to make of that property.

Id. at *21 (emphasis added).

> In light of the intense congressional concern with avoiding the dissipation of *forfeited assets* prior to conviction, and the absence of any exception, express or implied, to the prohibition against a defendant's transfer of *tainted assets* to third parties, there is no force to respondent's suggestion that Congress must have intended to permit defendants to use *"tainted"* assets to purchase legal services.

Id. at *28-29 (emphasis added); accord *id.* at *29 ("a prohibition against using *tainted assets* to pay an attorney does not violate the Sixth Amendment. "); *id.* at *30, *31, *37, *41-42.

> [T]here is nothing in the Sixth Amendment that requires that the defendant be permitted to use *funds that are subject to forfeiture* to hire the attorney of his choice. Petitioner argues that if the forfeiture in this case is upheld, attorneys will not agree to represent defendants in cases in which forfeitures are sought, because of the risk that all of the defendant's assets will be forfeited and the defendant will not be able to pay his fee. That

> will occur, if at all, only in cases in which the defendant has no legitimate assets with which to pay his attorneys, *since it is only tainted assets that are subject to forfeiture.*

Brief for the United States in *Caplin & Drysdale, Chtd. v. United States*, No. 87-1729, 1988 WL 1026332 (U.S.) at *13 (emphasis added).

> Nor is there any basis for a special exception for situations in which it is an attorney who accepts the assets from the defendant with knowledge or cause to believe that they are *tainted by illegality.* . . [T]here is an important public interest in assuring public confidence in the integrity of the defense bar and the criminal justice system that particularly warrants a rule barring attorneys from receiving *the illicit proceeds and instruments of drug trafficking in payment of their fees.*

Id. at *29 (emphasis added).

> [N]either the Fifth Amendment nor the Sixth Amendment requires Congress to fashion a special exception to to permit defendants to use *the illicit proceeds and instruments of their narcotics trafficking* to pay legal fees. Nor does either Amendment require Congress to allow an attorney to receive *such assets* in payment of his fees, where the attorney knew or had reason to know that the *assets were illegally derived.*

Id. at *33 (emphasis added); *see also id.* at *35-36 ("the en banc court below was correct in declining to

expand the qualified right to counsel of choice to an absolute right to retain counsel with illegally acquired assets."); *accord id.* at *42.

Lest there be any doubt, in *Caplin* the Government titled its argument section (bold and all capital letters in original):

> II. THE CONSTITUTION DOES NOT REQUIRE CONGRESS TO FASHION A SPECIAL EXCEPTION TO THE UNIFORM RULE OF MANDATORY FORFEITURE FOR THOSE *TAINTED ASSETS* THAT THE DEFENDANT WANTS TO USE TO PAY AN ATTORNEY

Id. at *33 (emphasis added); *see also id.* at *iii (Table of Contents).

The Government is hard-pressed to find even a single reference in either *Monsanto* or *Caplin* to "substitute" assets. There is none. Although the Court adopted the Government's nomenclature in those cases, it did not decide the question presented in the instant Petition. The restraint of "substitute" assets was not on the Court's radar when it heard those cases 25 years ago. The issue was never raised by the litigants, much less decided by this Court. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not

stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.") (Scalia, J., dissenting).

When *Kaley v. United States*, 134 S. Ct. 1090 (2014), came before the Court, the issue was whether a defendant was entitled to a hearing to challenge the ex parte restraint of assets needed for counsel of choice. Because the Kaleys did not dispute the nexus between the restrained assets and the crime charged, this Court expressly did not "opine" on whether a hearing would be required to evaluate whether "probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Id.* at 1095 and n.3. Yet, if, as the Government now suggests, the Court had already decided in *Monsanto* and *Caplin* that taint was not a pre-requisite to restraint, then why the express reservation?

Chief Justice Roberts' dissenting opinion did weigh in on that question, describing traceability as a "constitutional[ ] *must*":

> [T]he indictment draws no distinction between the grand jury's finding of probable cause to believe that the Kaleys committed a crime and its finding of probable cause to believe that certain assets are traceable to that crime. Both showings must be made to justify a pretrial asset restraint under *Monsanto*. . .

Id. at 1108 & n.2 (Roberts, C.J., dissenting) (emphasis in original). Nothing in either the majority or dissenting opinions in *Kaley* suggests that this Court had already "foreclosed" a constitutional challenge to the restraint of untainted assets needed for counsel of choice.

The Government conceded as much in response to questions by Justice Kennedy during oral argument. "At oral argument, the Government agreed that a defendant has a constitutional right to a hearing on that question. whether probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Kaley*, 134 S. Ct. at 1095 n.3. Surely, that concession was understood by all who heard it to mean that if "the assets that are restrained are not actually the proceeds of the charged criminal offense," *id.* at 1108 (Roberts, C.J., dissenting), then *the Constitution* would forbid the continued restraint of those assets insofar as they are needed to retain counsel of choice. After all, if the constitutionality of such restraints had already been upheld in *Monsanto* and *Caplin*, why would the Government concede that the *Constitution* would ever require a hearing on traceability–particularly when, "by listing property in the indictment and alleging that it is subject to forfeiture .. the grand jury found probable cause to believe those assets were linked to the charged offenses?" *Id.*

The Government now offers a different spin on that concession:

> In *Kaley*, the government had sought and obtained a pretrial order restraining under Section 853(e) only directly forfeitable assets – that is, "proceeds obtained from" or involved in "the [charged] offense(s) and all property traceable to such property." As noted above, when the government claims entitlement to forfeiture of such assets and no others, traceability or other direct relation to the crime is indeed a "requirement[ ] for forfeiture." *Kaley*, 134 S. Ct. at 1095. In that situation, if the government obtains a restraint on a bank account or other asset that the defendant contends is not directly forfeitable, then the defendant is entitled to a hearing on that question if he lacks other funds to retain counsel.
>
> Thus, government counsel in *Kaley* conceded only that a defendant is entitled to a hearing on traceability when that is the rationale invoked by the government in support of a pre-trial restraint.

BIO 13-14 (citations omitted).

The Government's explanation is based on a faulty premise: that in *Kaley*, the Government "claim[ed] entitlement to forfeiture of such [directly forfeitable, (*i.e.*, tainted)] assets *and no others.*" BIO 13 (emphasis added). Not so. In addition to seeking forfeiture of a certificate of deposit, a residence and a money judgment in the amount of $2,195,635.28, the forfeiture section of the *Kaley* indictment specifically invoked 21 U.S.C. § 853(p), to claim an entitlement to

the forfeiture of substitute assets. Joint Appendix filed in *Kaley v. United States*, No. 12-464 at 60-62. Thus, the indictment in *Kaley* did "claim[ ] entitlement" to both tainted and substitute assets.

The Government's effort to reconcile *United States v. Farmer*, 274 F.3d 800 (4th Cir. 2001), fails for the same reason. In *Farmer*, the Fourth Circuit held that a defendant "possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice." *Id.* at 804. That holding conflicts with the decision of the Eleventh Circuit in this case. The Government denies the conflict by arguing that the Fourth Circuit found a constitutional right to a tracing hearing "[g]iven the theory of forfeiture on which the Government had proceeded." BIO 15.[2]

---

[2] The Government also takes refuge in a few district court opinions in the Fourth Circuit purportedly upholding the constitutionality of pretrial restraints of substitute assets. BIO 16. Two of those cases were decided before *Farmer*. *United States v. Bollin*, 264 F.3d 391, 421-22 (4th Cir.), cert. denied, 524 U.S. 935 (2001) and 535 U.S. 989 (2002); *United States v. Helms*, No. 700CR00074, 2001 WL 1057751, at *2 (W.D. Va. 2001). Another was decided after *Farmer* but did not cite to it or even involve any Fifth or Sixth Amendment claims. *United States v. Bromwell*, 222 Fed. Appx. 307, 311 (4th Cir. 2007) (per curiam). Yet another district court mistakenly believed that *In re Billman* was a "post-*Farmer*" decision when, in fact, it pre-dated *Farmer* by ten years. *United States v. Wingerter*, 369 F. Supp. 2d 799, 810 (E.D. Va. 2005). And two of the cases held that *Farmer* actually required a taint hearing. *In re Restraint of Bowman Gaskins Fin. Grp. Accounts*, 345 F. Supp. 2d 613, 627-28 (E.D. Va. 2004); *United States v. Ziadeh*, 230 F. Supp. 2d 702, 704

(Continued on following page)

Nothing in the *Farmer* decision supports the assumption that the Government was eschewing any claim to substitute assets. The Fourth Circuit had already held, contrary to other circuits, *see* Petition 7 n.1, that the forfeiture statute permitted the pretrial restraint of substitute assets. *In re Billman,* 915 F.2d at 921.[3] Given the "strong governmental interest in obtaining full recovery of all forfeitable assets," *Caplin*, 491 U.S. at 631, without giving the defendant a "sneak preview" through a "pre-trial mini-trial," *Kaley*, 134 S. Ct. at 1102, it strains credulity that the Government in *Farmer* would unnecessarily subject itself to a tracing/taint hearing, at which it would need to "present evidence of probable cause to believe that the seized assets are tainted and forfeitable," *Farmer* 274 F.3d at 805, if the Constitution did not require one. In any event, the exercise of prosecutorial discretion to target some assets but not others could not give rise to a *constitutional* right to a tracing hearing to which a defendant would not otherwise be entitled.

(E.D. Va. 2002). *See also* Petition 27-29 (citing district court cases holding that the Fifth and/or Sixth Amendments prohibit the restraint of untainted assets needed to retain counsel).

[3] In *In re Billman*, the Fourth Circuit rejected a sixth amendment claim by the defendant to pay for an attorney with the substitute assets of a fugitive co-defendant, *id.* at 920-22, but did not address a defendant's right to use her *own* untainted assets to retain counsel of choice. See Petition 26-27 n.8.

The debate over the constitutionality of restraining "wholly legitimate funds to hire the attorney of his choice," *id.* at 804, is a matter of great concern: "[F]ew things could do more to undermine the criminal justice system's integrity than to allow the Government to disarm its presumptively innocent opponent by depriving him of his counsel of choice. . ." *Kaley*, 134 S. Ct. at 1110 (Roberts, C.J., dissenting) (citations and internal quotation marks omitted). This case presents a suitable vehicle to address head-on the constitutional question.[4] The Government does not suggest otherwise.

---

[4] Although "[P]etitioner's claim is that the Constitution bars pretrial restraint of substitute assets in every case in which the defendant needs funds to pay for counsel," BIO 17, Petitioner has challenged, in the alternative, "the process to contest the preliminary injunction entered by the district court under Section 1345." *Id. See* Petition 11-13 and nn.3&4.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ASSOCIATIONS OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.

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INTEREST OF *AMICI*[1]

Amici are associations of practicing criminal defense lawyers in Florida and California. The Florida Association of Criminal Defense Lawyers ("FACDL") has twenty-eight chapters throughout the state of Florida, including its Miami chapter founded in 1963. California Attorneys for Criminal Justice ("CAJC") is a non-profit corporation founded in 1972, with members across the state of California. The two statewide organizations are among the largest affiliates of the National Association of Criminal Defense Lawyers, and they have a combined membership of over 3,000 attorneys. The members of these organizations are committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Constitution of the United States.

Amici are concerned that the decisions of the courts below in this case, if left standing, pose a grave threat to an accused's Sixth Amendment right to be represented in criminal proceedings by his counsel of choice. In light of the government's increasingly broad use of statutes permitting the restraint and forfeiture of assets unrelated to alleged criminal conduct, clients of *amici*'s members are often confronted with the issues raised in this case. Both organizations therefore have a particular inter-

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[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief.

est in urging this Court to review and reverse the ruling by the Court of Appeals.

Amici have appeared in this Court as *amicus curiae* on several occasions, most recently in *Kaley v. United States* (No. 12-464), where they argued that the government's asset forfeiture practice undermines the Fifth and Sixth Amendment rights of persons charged with crimes, including the critically important right to counsel of choice that is the focus of their arguments here. They offer their collective professional experience and expertise in the present case to illustrate how the government's use of asset restraint and forfeiture imperils constitutional rights that are fundamental to the fairness and integrity of our nation's criminal justice system.

SUMMARY OF ARGUMENT

Under the Sixth Amendment to the Constitution, a criminal defendant has a right not only to be represented by counsel, but also "to choose *who* will represent him." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (emphasis added). As this Court has recognized, in light of counsel's crucial role in ensuring that a defendant receives the full protection the law affords, the right to be represented by counsel of choice is nothing less than "the root meaning of the constitutional guarantee" enshrined in the Sixth Amendment. *Id.* at 147-48.

That right is under threat. Armed with statutes authorizing the seizure or restraint of a criminal defendant's property prior to trial—including "untainted" assets not traceable to the alleged conduct—the government has the power to prevent those accused

of crime from accessing funds needed to retain counsel. In theory, the restraint and forfeiture of tainted assets in a defendant's possession is merely meant to ensure that "crime does not pay." *Kaley v. United States*, 134 S. Ct. 1090, 1094 (2014). But when paired with statutory provisions that define the financial loss stemming from alleged criminal conduct in expansive terms, the laws governing asset restraint and forfeiture enable the government effectively to deny the defendant the ability to retain counsel of choice.

Upholding a criminal defendant's constitutional right to choose who will represent him requires that courts release untainted funds—those with no nexus to the alleged offense conduct—needed to pay for counsel. In rejecting petitioner's request to have such assets released, the Eleventh Circuit misread this Court's precedents as foreclosing her constitutional claim. This Court, however, has never confronted the most pressing question presented here: Whether the pretrial restraint of *untainted* assets needed to retain counsel of choice violates the Sixth Amendment. If anything, this Court and others have made clear that the Sixth Amendment protects a defendant's right "to spend his own money" to obtain the assistance of counsel. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) (internal quotation marks omitted).

The Eleventh Circuit also ignored repeated warnings from other courts that the protection of this Sixth Amendment right demands that prosecutorial power over a criminal defendant's property be kept within reasonable limits. And while Congress has endowed the government with a number of stat-

utory tools to prevent criminals from benefitting from their "ill-gotten gains," *United States v. Monsanto*, 491 U.S. 600, 616 (1989), it too has demonstrated its understanding that the government's authority to seize property derived from criminal conduct does not trump a criminal defendant's constitutional right to choose who will represent him.

At issue in this case is the defense of a fundamental right, a distinguishing feature of this nation's constitutional protection for those facing the power of the state in a criminal proceeding. In light of the danger that the ruling by the courts below poses to a criminal defendant's right to counsel of choice, review and reversal by this Court is warranted.

ARGUMENT

I. BROAD PRETRIAL RESTRAINT OF UNTAINTED ASSETS DEPRIVES A CRIMINAL DEFENDANT OF HIS SIXTH AMENDMENT RIGHT TO BE REPRESENTED BY THE COUNSEL OF HIS CHOICE.

The government's power to restrain and ultimately forfeit a criminal defendant's financial assets is a potent one. Wielding statutes that define broadly the economic harm of various crimes, the government seeks—and often secures—judicial orders restraining assets far in excess of proceeds the defendant might have realized from the charged conduct. Then, by invoking statutory provisions that authorize the seizure of "equivalent value" or "substitute" property when tainted assets are unreachable, the government puts under lock and key any

legitimately derived assets a defendant might have in his possession.

The danger this two-fisted approach poses to a criminal defendant's right to counsel of choice is amply illustrated by the facts of this case. In response to petitioner's alleged Medicare fraud, the district court acceded to the government's demand that it freeze $45 million of her assets, an amount that represented all of the revenue her business had received from Medicare during a given period. Pet. App. 12-14. The court granted the request despite testimony from a government witness that, after legitimate expenses, petitioner had retained only a fraction of that amount. *Id.* at 14.

Because the $45 million figure represented an amount many times greater than petitioner's net worth, *id.* at 12, the district court's restraining order necessarily reached both the "proceeds and profits" derived from the alleged crime *and* assets with no connection to it—*i.e.*, "property of an equivalent value," *id.* at 6. Despite agreement between the government and petitioner that the court's order would likely restrain assets that would otherwise be available to retain counsel of choice, Pet. 12, the court rejected petitioner's argument that the Sixth Amendment required the release of funds, Pet. App. 29-33. The court apparently believed that representation by appointed counsel in petitioner's criminal proceedings would obviate any constitutional difficulties. *Id.* at 33.

In light of this Court's longstanding recognition of the importance of a defendant's right to counsel of

choice, the decision below was wrong and should be reversed.

A. As This Court Repeatedly Has Recognized, the Constitution Protects a Criminal Defendant's "Vital Interest" in Retaining Counsel of Choice.

The Sixth Amendment ensures that every criminal defendant has the right to the assistance of competent counsel in his defense. As this Court repeatedly has recognized, a crucial aspect of this right "is the right of a defendant ... to choose who will represent him." *Gonzalez-Lopez*, 548 U.S. at 144; *see also Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that ... a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *Chandler v. Fretag*, 348 U.S. 3, 9 (1954) (noting "the right to be heard through [one's] own counsel").

Because the selection of a lawyer is effectively a decision about how best to preserve one's liberty in the face of the government's power to punish, a defendant has a "vital interest" in retaining counsel of his own choosing. *Kaley*, 134 S. Ct. at 1102. While in a criminal proceeding the accused retains ultimate authority in conducting his defense, in practice a lawyer necessarily assumes responsibility for making numerous decisions crucial to protecting a defendant's rights. *See Powell*, 287 U.S. at 69 ("Even the intelligent and educated layman ... requires the guiding hand of counsel at every step in the proceedings against him."). As this Court explained in *Gonzalez-Lopez*:

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial.

548 U.S. at 150; *see also Caplin & Drysdale*, 491 U.S. at 647 (Blackmun, J., dissenting) (noting that the initial choice of counsel is "the primary means for the defendant to establish the kind of defense he will put forward"); *Wheat v. United States*, 486 U.S. 153, 165 (1988) (Marshall, J., dissenting) ("[A] primary purpose of the Sixth Amendment is to grant a criminal defendant effective control over the conduct of his defense.").

Accordingly, the Sixth Amendment does not simply guarantee that a criminal defendant will have *a* lawyer; it also ensures that, within reasonable limits, he can have *the* lawyer he believes will best secure his rights. In fact, the right to counsel *of choice* is more absolute than the right to competent counsel. While claims of ineffective assistance of counsel are subject to a form of harmless error analysis, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the improper deprivation of the right to counsel of choice constitutes structural error, *Gonzalez-Lopez*, 548 U.S. at 150. Such errors—which form "a very limited class," *Johnson v. United States*, 520 U.S. 461, 468 (1997)—mandate automatic reversal of any subsequent conviction because they "bear[] di-

rectly on the 'framework within which the trial proceeds,'" *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)), and "undermine the fairness of a criminal proceeding as a whole," *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013). As a result, even competent representation by substitute counsel does not cure a violation of a defendant's Sixth Amendment right to employ the lawyer he thinks is best. *See Gonzalez-Lopez*, 548 U.S. at 144-45.

Nor is the right to counsel of choice one that need only be afforded at trial. As this Court has long recognized, the "critical period" in a criminal proceeding—when the advice of counsel is most needed—is not the trial itself, but instead begins much earlier, when "thorough-going investigation and preparation [are] vitally important." *Powell*, 287 U.S. at 59-60. Or as the Seventh Circuit put it, "[t]he defendant needs the attorney *now* if the attorney is to do him any good." *United States v. Moya-Gomez*, 860 F.2d 706, 726 (7th Cir. 1988). Accordingly, while the deprivation of funds under a restraining order like the one entered in this case is ostensibly "temporary," in reality the initial denial of a defendant's constitutional right to choose his own lawyer is "'effectively a permanent one.'" *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417-418 (D.C. Cir. 2008) (quoting *United States v. Monsanto*, 924 F.2d 1186, 1193 (2d Cir. 1991)).

The right to counsel of choice is not absolute, of course. *See Gonzalez-Lopez*, 548 U.S. at 144. An advocate who is not a member of the bar may not represent clients, and a defendant cannot insist on representation by an attorney he cannot afford, or

who otherwise declines. *Wheat*, 486 U.S. at 159. Attorneys with conflicts of interest also cannot represent clients who might want their services. *Id.* But these conditions aside, this Court has emphasized that the right to select counsel of one's choice is not simply an ancillary privilege to be discarded in favor of the government's interest in fighting crime. Rather, it is "the root meaning of the constitutional guarantee" enshrined in the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 147-48.

B. The Federal Government's Restraint of Untainted Assets Deprives Criminal Defendants of Funds Needed to Pay Counsel.

As this Court has noted, the seizure or restraint of property in a criminal defendant's possession is meant to ensure that "crime does not pay." *Kaley*, 134 S. Ct. at 1094. By depriving criminals of their "ill-gotten gains," *Monsanto*, 491 U.S. at 616, forfeitures "punish wrongdoing, deter future illegality, and lessen the economic power of criminal enterprises," *Kaley*, 134 S. Ct. at 1094 (internal quotation marks omitted). Seized assets may also be used to compensate crime victims and support law enforcement activities. *Caplin & Drysdale*, 491 U.S. at 629-30.

The government can also use *pretrial* injunctions and restraining orders to prevent a person accused of a serious crime from dissipating any alleged proceeds. *See* 18 U.S.C. § 1345(a)(2)(B) (authorizing a restraining order to prohibit any person from "withdrawing, transferring, removing, dissipating, or disposing of" property derived from criminal con-

duct); 21 U.S.C. § 853(e)(1) (empowering a court to enter a restraining order or injunction to "preserve the availability of property" subject to forfeiture); *United States v. DBB, Inc.*, 180 F.3d 1277, 1283 (11th Cir. 1999) (stating that Congress' main object in enacting § 1345 was "to enhance the government's ability to enjoin the dissipation of assets wrongfully obtained through fraud").

Freezing assets following an indictment is *not* meant to deprive a criminal defendant of his constitutional right to retain counsel. *See* H.R. Rep. No. 98-845, pt. 1, p. 19 n.1 (1984) (remarking that "[n]othing" in 21 U.S.C. § 853 "is intended to interfere with a person's Sixth Amendment right to counsel"); *cf. Monsanto*, 491 U.S. at 613 (noting that "'[t]he *sole* purpose of [§ 853's] restraining order provision ... is to ... assure the availability of the property pending disposition of the criminal case'" (emphasis added) (internal quotation marks omitted)). But when the government's seizure of legitimate property leaves those accused of crime without the means to pay for a lawyer, that is precisely what it does.

The threat to the Sixth Amendment right to counsel of choice arises when statutes that broadly define the economic harm of criminal offenses are combined with those that enable the government to restrain "untainted" assets wholly unconnected to the alleged criminal conduct. Numerous laws addressing financially-related crimes describe the loss from such conduct in expansive terms. The forfeiture statutes for money laundering-related offenses, for example, authorize the forfeiture of any property "involved in" a money laundering transaction.

18 U.S.C. §§ 981(a)(1)(A), 982(a)(1); *see also* 31 U.S.C. § 5317(c)(1)(A) (mandating forfeiture of all property "involved in" currency structuring offenses); 18 U.S.C. § 981(a)(2)(A) (specifying that the "proceeds" forfeitable to the government are "not limited to the net gain or profit realized" from the covered offenses). The statute at issue in this case, § 1345, similarly allows for the restraint of any assets "obtained as a result of" a banking or health care offense. 18 U.S.C. § 1345(a)(2).

Applied broadly, formulations like "proceeds," "involved in," and "obtained as the result of" extend the government's restraint and forfeiture power to assets far beyond any sums a defendant might have realized from the alleged offense. *See, e.g.*, *United States v. Davis*, 706 F.3d 1081, 1082-84 (9th Cir. 2013) (upholding a money laundering forfeiture award for $1.3 million in laundered funds against a defendant who received only $73,782 in commissions for his involvement); *United States v. Puche*, 350 F.3d 1137, 1153-54 (11th Cir. 2003) (upholding forfeiture order of $1.6 million of defendants' assets because it included $22,375.00 in illegally-derived funds); *United States v. Bollin*, 264 F.3d 391, 417-19 (4th Cir. 2001) (upholding $1.2 million forfeiture judgment against attorney who received only $30,000 in fees for minor role in securities fraud); *see also United States v. Schlesinger*, 396 F. Supp. 2d 267, 271-72 (E.D.N.Y. 2005) (citing additional cases).

Broad definitions of loss are only part of the Sixth Amendment problem. Under the statute at issue in this case, for example, the government's reach is not limited to assets "obtained as a result of" alleged criminal conduct. In cases where assets

traceable to the crime are unreachable or difficult to locate, § 1345 permits the government to restrain "property of equivalent value"—that is, untainted assets—belonging to the person suspected of the offense. 18 U.S.C. § 1345(a)(2)(B). By allowing the court to restrain assets of value equal to those the government has directly traced to the alleged offense, § 1345 is meant to provide the government "relief" when tainted property "is not as easily identified." *DBB, Inc.*, 180 F. 3d at 1286; *cf. also* 21 U.S.C. § 853(p) (allowing the government to seek forfeiture of untainted "substitute property" when the property derived from an alleged offense cannot be located). As a result, when illegally-obtained assets are not accessible, property derived from legitimate sources may be restrained or forfeited instead.

When used in tandem, statutes that broadly define property obtained as a result of alleged offense conduct and those that authorize the restraint of untainted "equivalent" or "substitute" assets create a formidable one-two punch. By describing the loss resulting from alleged criminal conduct in amounts far greater than the proceeds the defendant might have realized, and then invoking the "equivalent value" provision, the government can often reach *all* of a defendant's assets. The result is that the defendant is left with no means by which he can retain the counsel of his choice.

The need for meaningful checks on the government's restraint power is all the more apparent given the temptation that prosecutors face to exercise their power in ways that impair a defendant's ability to mount a full defense. Though it is assuredly both "unseemly and unjust" for the government "to beggar

those it prosecutes in order to disable their defense at trial," *Caplin & Drysdale*, 491 U.S. at 635 (Blackmun, J., dissenting), such conduct is not beyond imagining, *see Kaley*, 134 S. Ct. at 1106 (Roberts, C.J., dissenting) (noting that the government added a money laundering charge to the defendants' indictment two days after a magistrate judge declined to freeze the full asset amount originally sought). And regardless of how remote the possibility of prosecutorial abuse may be, it must be vigilantly guarded against. As this Court has acknowledged, the idea that the government has "a legitimate interest in depriving criminals of economic power ... to retain counsel of choice" is, to say the least, "somewhat unsettling." *Caplin & Drysdale*, 491 U.S. at 630.

C. The Constitution Requires That a Criminal Defendant Be Permitted to Access Untainted Funds Needed to Retain Counsel.

The government's use of its double-barreled weapon to cripple financially a criminal defendant raises serious concerns as a matter of basic fairness. *See Davis*, 706 F.3d at 1084-85 (9th Cir. 2013) (Berzon, J., concurring); *United States v. Contorinis*, 692 F.3d 136, 147-48 (2d Cir. 2012). By preventing a defendant from spending money to hire the lawyer he wants, the government also interferes with his constitutional right "to choose who will represent him." *Gonzalez-Lopez*, 548 U.S. at 144.

In light of a defendant's Sixth Amendment right "to spend his own money" in securing counsel, *Caplin & Drysdale*, 491 U.S. at 626 (internal quotation

marks omitted), when a district court restrains untainted assets prior to trial, it must—at the very least—release an amount sufficient to allow for payment of reasonable attorney's fees. The Eleventh Circuit in this case apparently disagreed, believing that petitioner's request for funds was "foreclosed" by this Court's decisions in *Kaley*, *Monsanto*, and *Caplin & Drysdale*. Pet. App. 3.

Not so. *Kaley* did not address a Sixth Amendment claim; the sole question the Court answered was whether the Fifth Amendment entitles defendants seeking to recover restrained property to an opportunity to contest a grand jury's determination that probable cause existed to believe that they committed the crimes charged. 134 S. Ct. at 1094.[2] And unlike the present case, *Kaley* did not involve pretrial restraint of untainted property; the petitioners conceded that the restrained assets were traceable to the alleged criminal conduct. *Id.* at 1096, 1097. Thus there was no opportunity for this Court to address whether pretrial restraint of "substitute" or "equivalent" property posed a Sixth Amendment problem.

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[2] *Kaley* also did not foreclose a different Fifth Amendment challenge to the decision below. Several courts have recognized the potential constitutional difficulty of allowing the government to restrain assets with only a showing of "probable cause" to believe that the property is traceable to the offense conduct—as the trial court did here—rather than applying a more demanding burden of proof. *See United States v. Legro*, 284 Fed. Appx. 143, 145 (5th Cir. 2008) (discussing the distinction); Pet. App. 11 (citing cases).

The same applies to *Caplin & Drysdale* and *Monsanto*. In both cases there was no question that the assets subject to forfeiture or restraint were traceable to the conduct in question. *See Caplin & Drysdale*, 491 U.S. at 619-20; *Monsanto*, 491 U.S. at 602-04. Accordingly, this Court has never confronted the key question presented in this case: Whether the pretrial restraint of *untainted* assets needed to retain counsel of choice violates the Sixth Amendment.

The distinction between tainted and untainted assets is constitutionally crucial. In *Caplin & Drysdale*, this Court concluded that assets traceable to the alleged crime are forfeitable under § 853, even if needed to pay attorney's fees, because the "property" in question is not rightfully the defendant's. A bank robber, the Court explained, has no right to spend the funds he has stolen to retain an attorney, because "[t]he money, though in his possession, is not rightfully his." 491 U.S. at 626; *see also id.* ("A defendant has no Sixth Amendment right to spend *another person's money* for services rendered by an attorney ...." (emphasis added)). When the government seeks forfeiture, the Court found, it takes title to the disputed property "at the time of the criminal act," *Caplin & Drysdale*, 491 U.S. at 627; *see also United States v. Stowell*, 133 U.S. 1, 16-17 (1890) (noting that the government's right to the property" vests "immediately upon the commission of the act"), with the possibility of restitution to the rightful owners in certain circumstances, *Caplin & Drysdale*, 491 U.S. at 629-30.

But when a criminal defendant seeks to retain counsel with assets unrelated to the alleged criminal

conduct, he is spending no one's money but his own. In criminal forfeiture cases, for example, the government has no preexisting claim to legitimate property belonging to someone who simply happens to have been accused of a crime. *See United States v. Jarvis*, 499 F.3d 1196, 1205 (10th Cir. 2007) ("The government's interest in [substitute property], if any, is only a potential and speculative future interest.").

Congress recognized as much in designing 21 U.S.C. § 853, the principal drug forfeiture statute, whose procedures govern most criminal forfeiture proceedings. That statute explicitly gives the government the benefit of a "relation back" doctrine that vests title to proceeds derived from criminal conduct "upon the commission of the act." 21 U.S.C. § 853(c). By its terms, however, this relation-back provision does *not* apply to "substitute property." *Id.*; *see also United States v. Erpenbeck*, 682 F.3d 472, 477 (6th Cir. 2012) ("The relation-back clause [in § 853(c)] extends only to tainted property ...."); *Jarvis*, 499 F.3d at 1204-05 (similar). *But see United States v. McHan*, 345 F.3d 262, 272 (4th Cir. 2003) (holding that title to "substitute property" under § 853 vests in the government "at the time of the commission of the acts giving rise to the forfeiture").

Accordingly, when a court refuses to release assets not traceable to the alleged criminal conduct, it effectively prevents a defendant from using *his own money* to retain much-needed counsel. Given this Court's explicit recognition that the Sixth Amendment protects precisely this right, the restraint of untainted assets a criminal defendant needs to pay his lawyer raises significant constitu-

tional concerns. *See Caplin & Drysdale*, 491 U.S. at 626 (noting an "individual's right to spend his own money to obtain the advice and assistance of ... counsel" (internal quotation marks omitted)). Simply put, the defendant's significant interest in exercising his constitutional right to retain counsel of choice trumps the government's minimal interest in controlling assets over which it has no ownership claim under the relation back doctrine. *See United States v. Najjar*, 57 F. Supp. 2d 205, 209 (D. Md. 1999) ("[The] Defendant's Sixth Amendment right to counsel is simply more important than the Government's interest in ... Defendant's substitute property.").

The need to protect a defendant's Sixth Amendment right to use untainted funds to pay for counsel is illustrated by a hypothetical better tailored to the complex facts of this and similar cases than the bank robber example the district court relied on below. In a more accurate scenario, the defendant is not a bank robber at all; similar to the petitioner in this case, he is a doctor. Charging him with widespread Medicare fraud, the government restrains and ultimately seeks to forfeit $15 million in gross Medicare receipts, even though his practice has a host of legitimate expenses: office rent, employee salaries, and medical equipment. *See* 18 U.S.C. § 981(a)(2)(A) (specifying that forfeitable proceeds are "not limited to the net gain or profit realized from the offense"); *id.* at § 1345(a)(2) (permitting the restraint of property "obtained as a result of" a health care offense). Moreover, at trial the government is only able to prove $50,000 in fraudulent billings. *See United States v. Rutgard*, 116 F.3d 1270, 1290 (9th Cir. 1997) (recounting similar facts).

Nevertheless, the Sixth Amendment damage has already been done. Because the defendant never realized any amount close to $15 million from his allegedly fraudulent conduct, all legitimately derived assets he possesses—including the money he would have used to pay for a lawyer—are frozen, via the "equivalent value" provision in the statute. Under such circumstances, the release of funds needed to pay counsel will be the only means through which a defendant is able to exercise meaningfully his right to counsel of choice.

To be sure, like other aspects of the Sixth Amendment, the right to counsel of choice is subject to certain qualifications. *See supra* 8-9. In order to obtain release of funds to pay for counsel, a defendant will bear the burden of establishing that, under the restraints approved by the court, he has access to no other assets with which he can retain a lawyer. *See United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998). And it may additionally be appropriate for a district court to set conditions on payments to attorneys—including perhaps setting the fee structure—to ensure that such disbursements are reasonable and used for legitimate purposes. But subject to those conditions, the Sixth Amendment requires that a criminal defendant have access to legitimate assets needed to pay a lawyer of his choosing. Otherwise, a defendant's Sixth Amendment right to "be defended by the counsel he believes to be best," *Gonzalez-Lopez*, 548 U.S. at 146, will often be no right at all.

II. MEANINGFUL PROTECTION FOR A DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE ACCORDS WITH CONGRESSIONAL AND JUDICIAL CONCERNS REGARDING OVERBROAD ASSET RESTRAINT AND FORFEITURE.

In rejecting petitioner's constitutional claim, the courts below ignored the fact that Congress and the federal courts alike have recognized that the government's authority to seize a criminal defendant's assets must be subject to certain checks. Underlying these concerns is the recognition that overbroad restraint and forfeiture poses a significant threat to a criminal defendant's rights under the Sixth Amendment.

A. The Eleventh Circuit's Ruling Conflicts With the Prevailing Views of Other Courts of Appeals Regarding the Restraint of Untainted Assets.

While the Eleventh Circuit in this case was tone deaf to the dangers posed by the government's authority to restrain and seize untainted assets, other courts have recognized that the forfeiture power's "very potency ... demands that it be reasonably contained within ascertainable limits." *United States v. Saccoccia*, 354 F.3d 9, 15 (1st Cir. 2003). Recognizing that a defendant's right to counsel of choice is "an essential component of the Sixth Amendment," *Jones*, 160 F.3d at 646, a number of Courts of Appeals have held that due process requires that a defendant be granted a hearing to contest the forfeitability of property the government wants to seize under 21 U.S.C. § 853. *See Jones*, 160

F.3d at 647; *Monsanto*, 924 F.2d at 1195; *United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001); *United States v. Michelle's Lounge*, 39 F.3d 684, 697-98 (7th Cir. 1994); *cf. Kaley*, 134 S. Ct. at 1108 (Roberts, C.J., dissenting) (noting that at a defendant's request a district court "constitutionally *must*" reassess a grand jury finding that the property in question is traceable to the alleged crime).

As these courts have explained, judicial scrutiny of the government's forfeitability assertions is essential, as any imposition on a defendant's right to counsel at the pretrial stage threatens to "work a permanent deprivation." *Jones*, 160 F.3d at 646; *see also United States v. Kaley*, 579 F.3d 1246, 1258 (11th Cir. 2009) ("Being effectively shut out by the state from retaining the counsel of one's choice ... is a substantial source of prejudice"); *United States v. Tardon*, No. 11-20470, 2014 WL 5431298, at *12-13 (S.D. Fla. Oct. 22, 2014) (releasing funds to pay for counsel in light of Sixth Amendment concerns); *SEC v. FTC Capital Mkts., Inc.*, No. 09 Civ. 4755, 2010 U.S. Dist. LEXIS 65417, *10-25 (S.D.N.Y. June 29, 2010) (same).

The Courts of Appeals have been similarly careful when considering the pretrial seizure of assets more generally. For example, they have determined that 21 U.S.C. § 853, which authorizes the forfeiture of "substitute property" when assets derived from illegal drug activity cannot be located, does *not* allow for pretrial restraint of such property. *United States v. Parrett*, 530 F.3d 422, 430-431 (6th Cir. 2008); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 365 (9th Cir. 1994); *United States v. Floyd*, 992 F.2d 498,

500-502 (5th Cir. 1993). *But see In re Billman*, 915 F.2d 916 (4th Cir. 1990).

Recognizing the perils inherent in the "extensive powers" conferred by § 853's postconviction forfeiture provisions, these courts have been highly reluctant to hand prosecutors the "even greater governmental power" of pretrial restraint when the statutory text does not command such a result. *Ripinsky*, 20 F.3d at 365. Even though § 853 itself directs courts to construe its provisions "liberally" in order to "effectuate its remedial purposes," 21 U.S.C. § 853(o), courts have concluded that in light of the statute's "punitive nature" they must be "cautious" about reading the substitute property provision too broadly, *Ripinsky*, 20 F.3d at 363 n.5. Accordingly, courts have categorically refused to extend the "drastic remedy" of pretrial restraint to the untainted assets of an individual who was "merely accused of a crime, and thus is presumptively innocent." *Id.* at 365.

The import of these decisions is clear: Whether as a matter of statutory construction or constitutional principle, the "very potency" of the government's broad authority to restrain a defendant's assets prior to trial demands that such authority be subject to meaningful constraints.

B. The Eleventh Circuit's Decision Also Ignores Congressional Recognition That There Must Be Meaningful Limits on the Government's Authority to Seize a Criminal Defendant's Assets.

Concerns about the scope of the forfeiture and restraint power are not limited to the judicial branch. Under the government's theory in this case, pretrial restraint of assets that far exceed both the amount traceable to the alleged wrongdoing and a defendant's net worth is a perfectly acceptable exercise of prosecutorial authority under 18 U.S.C. § 1345, even when such seizure effectively negates the defendant's constitutional right to counsel of choice. But with one exception Congress has never authorized a blanket "estate forfeiture" of this kind. *See id.* at § 981 (a)(1)(G) (authorizing forfeiture of "all assets, foreign or domestic" of any individual, entity or organization engaged in, planning or perpetrating a federal crime of terrorism).

Indeed, such wholesale abnegation of a criminal defendant's property rights is constitutionally disfavored. Article III, § 3 of the Constitution forbids forfeiture of estate as a punishment for treason "except during the Life of the Person attainted," U.S. Const., Art. III, § 3, cl. 2, despite the fact that such forfeitures were common in England, *see Austin v. United States*, 509 U.S. 602, 611-13 (1993). The First Congress likewise abolished estate forfeitures as a punishment for felons, Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117, and subsequent legislatures followed suit, *see Wallach v. Van Riswick*, 92 U.S. 202, 208-09 (1875).

Along these lines, in the last several decades Congress has sought to ensure that the seizure of assets related to criminal behavior does not operate unjustly to deprive defendants—and others—of their property, despite the general expansion of the government's forfeiture power that followed passage of the Organized Crime Control Act of 1970, Pub. L. No. 91-451, 84 Stat. 922. For example, Congress included a provision in the RICO statute ensuring that a non-defendant third party can recover his interest in otherwise-forfeitable property acquired under a bona fide purchase for value. 18 U.S.C. § 1963(l)(6); *see also* 21 U.S.C. § 853(n) (providing a similar avenue for third parties to seek relief in narcotics cases).

Moreover, in reforming the statutory scheme governing most criminal forfeiture cases, Congress has shown special solicitude for defendants' rights to adequate legal representation. Most importantly, in drafting 21 U.S.C. § 853 Congress recognized the deleterious consequences that asset restraint can have on a defendant's representation, and expressly disclaimed any "inten[t] to interfere with a person's Sixth Amendment right to counsel." H.R. Rep. No. 98-845, at 19, n.1 (1984). Reflecting similar concerns, shortly after enactment of 18 U.S.C. § 1957, which outlaws monetary transactions in property derived from specified unlawful activity, Congress revised the law to make clear that the term "monetary transaction" did *not* include "any transaction necessary to preserve a person's right to representation as guaranteed by the [S]ixth [A]mendment to the Constitution." 18 U.S.C. § 1957(f)(1).

The executive branch also has recognized the potential threat that asset forfeiture poses to the constitutional right to counsel. *See* U.S. Attorneys' Manual 9-120.101 (added May 2010) (stating that the forfeiture of monies paid as attorney's fees is to be conducted "with due consideration for the individual's right to counsel"). This concern is by no means misplaced. Though pretrial asset restraint can potentially aid a prosecution by impairing the accused's defense, if the defendant ultimately prevails on a Sixth Amendment claim the entire proceedings are undone, wasting the countless hours and untold dollars in government resources. *See Gonzalez-Lopez*, 548 U.S. at 152 (affirming that erroneous deprivation of a defendant's right to counsel of choice necessitates vacatur of conviction).

In short, all three branches of government appreciate that the systemic consequences of denying a criminal defendant the right to be represented by counsel of choice reach far and wide: "[F]ew things could do more to undermine the criminal justice system's integrity than to allow the Government to ... disarm its presumptively innocent opponent by depriving him of his counsel of choice ...." *Kaley*, 134 S. Ct. at 1110 (Roberts, C.J., dissenting) (citations and internal quotation marks omitted). Because the Eleventh Circuit in this case ignored these concerns, review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

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v.

UNITED STATES, *Respondent*.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief *Amicus Curiae* of U.S. Justice Foundation, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Lincoln Institute, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

U.S. Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org, Gun Owners of America, Inc., and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, and related issues.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Many of these organizations filed an *amicus curiae* on the dangers of asset forfeiture laws brief in Kaley v. United States, 571 U.S. ___ (2014).[2]

STATEMENT

Asset forfeiture laws entrust to government with inherently dangerous powers, and those laws which authorize pre-conviction seizures are particularly fearsome. This case[3] involves the government's misuse of a federal **civil** forfeiture statute (18 U.S.C. § 1345) to seize, after indictment, but before conviction, effectively all of Petitioner's assets — including untainted assets which the government neither owns nor rightfully claims — preventing Petitioner from retaining her counsel of choice as she is entitled under the Sixth Amendment.

Although federal courts appear to have become comfortable with the increasingly unbridled practice of asset forfeiture — the pendulum has been allowed to swing too far, authorizing the exercise of arbitrary government power against the people, and resulting in current policy being critically re-examined in Congress, by the press, and even by former U.S. Department of Justice lawyers who once enforced asset

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[2] http://www.lawandfreedom.com/site/constitutional/KaleyvUS_amicus.pdf

[3] United States v. Luis, 564 Fed. Appx. 493 (11th Cir. May 1, 2014) Pet. App. 1; United States v. Luis, 966 F. Supp.2d 1321 (S.D.FL. June 21 2013) Pet. App. 8.

forfeiture laws.[4] It is important to note that the two primary cases on which the court of appeals below relied, Caplin & Drysdale and Monsanto, were both narrow 5-4 decisions. In a single dissent filed in both cases, Justices Blackmun, Brennan, Marshall, and Stevens vociferously denounced the government's claim of "a property interest in forfeitable assets, predicated on the relation-back provision" contained in 21 U.S.C. § 853(c) — as based on "a legal fiction to grant the Government title in all forfeitable property as of the date of the crime." These justices believed that resort to this fiction "gives the Government no property interest whatsoever ... before the defendant is convicted." *Id.* at 652.[5]

In the present case, the courts below have piled on yet another fiction — that "common sense" permits asset forfeiture laws to be used by the government to assemble a pool of assets, from which it could later collect if the defendant were convicted. Such a view finds no support either in the Caplin & Drysdale/ Monsanto dissent or in their majority opinions.

Petitioner correctly asserts the existence of a division within the circuits, in that the decision of the

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[4] *See e.g.*, J. Yoder & B. Cates, "Government self-interest corrupted a crime-fighting tool into an evil," *Washington Post* (Sept. 18, 2014). http://preview.tinyurl.com/mv8sv3v.

[5] As to the Sixth Amendment issue, these justices viewed "it ... unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial." *Id.* at 635.

Eleventh Circuit below is at odds with the Fourth Circuit decision in United States v. Farmer, 274 F.3d 800, 804 (4th Cir. 2001). In addition, the lower courts' decisions are at odds with the position of the Sixth Circuit, providing further reason for this court to grant *certiorari*. *See* United States v. Brown, 988 F.2d 658 (6th Cir. 1993), discussed *infra*.[6] Lastly, the decision below conflicts with the principles previously enunciated by the Eleventh Circuit in United States v. Bissell, 866 F.2d 1343 (1989), discussed *infra*.

In addition to the conflict in the circuits, these *amici* contend that this Court should grant *certiorari* because the Eleventh Circuit's decision "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S. Supreme Court Rule 10(a).

SUMMARY OF ARGUMENT

The district court improperly seized assets of the Petitioner over which the government has no property interest in violation of the Fifth Amendment, denying her the right to retain counsel of choice in violation of the Sixth Amendment. Each of the myriad federal laws authorizing seizures of assets are different, and the district court was careless in utilizing 18 U.S.C. § 1345 to seize Petitioner's untainted assets. The district court never made the findings of dissipation of

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[6] The Luis decision also appears to be in tension with several federal district courts. *See, e.g.*, United States v. Sriram, 147 F. Supp. 2d 914 (N.D.IL. 2001), discussed *infra*.

tainted property required by the statute. Then it imposed the seizure on the gross proceeds of Petitioners' business, even though such a power, if it exists at all, is reserved by statute to post-conviction seizures. Such a reading of the statute was not compelled; indeed, the decisions of the courts below constitute outliers even in the area of asset forfeiture where courts have been highly deferential to broad readings of statutes as advanced by prosecutors.

Then, the Court of Appeals failed to do its duty to review Petitioner's Constitutional claims *de novo* by claiming without analysis that four prior decisions, including three decisions of this Court, "foreclosed" Petitioner's appeal, when those decisions could never be read to have resolved the issue on appeal.

The district court also badly misunderstood fundamental principle of asset forfeiture, as well articulated by a prior Eleventh Circuit decision which warned against using these laws to create pools of assets against which the government could later assert claims. Asset forfeiture law was designed to permit government seizure only of property over which the government has a superior property interest — not the property of another. In so doing, the courts below abrogated Petitioner's protected common law property rights, including the right to expend her property to retain counsel of her choice.

As Congress and the courts have cooperated in the vast expansion of federal asset forfeiture powers, federal prosecutors have been given tools that no one in government should have, powers which put the

American people in fear not of punishment for crime, but fear of the exercise of arbitrary power by their government.

ARGUMENT

I. THE ELEVENTH CIRCUIT HAS MISAPPLIED THE FEDERAL FRAUD INJUNCTION STATUTE, SANCTIONING THE GOVERNMENT'S SEIZURE OF PROPERTY OVER WHICH IT HAS NO LAWFUL CLAIM.

The present case involves what is referred to as the federal Fraud Injunction Statute, 18 U.S.C. § 1345. This statute was enacted as part of the Comprehensive Crime Control Act of 1984, 98 Stat. 1837, 2152, which was amended in 1988 to apply to fraudulent claims against the United States and conspiracies to defraud the United States. In 1990, the statute was amended again "in the wake of the multi-billion dollar savings and loan debacle" to apply to "banking-law violations,"[7] and was otherwise modified into its present form.[8]

Section 1345 is just one of scores of federal statutes which govern civil and criminal asset forfeitures. *See generally* S. Cassella, "Overview of Asset Forfeiture

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[7] *See generally* United States v. Brown, 988 F.2d 658, 660-61 (6th Cir. 1993).

[8] The statute was further amended in 1994 and 1996 in other ways not relevant here (except to add "Federal health care fraud" to the list of offenses).

Law in the United States," U.S. Attorneys' Bulletin (Nov. 2007); the U.S. Department of Justice's Asset Forfeiture & Money Laundering Statutes compendium runs 349 pages.[9] Varying significantly, each asset forfeiture statute provides for the forfeiture of different assets, and although the constitutional issues herein apply broadly, each such statute must be analyzed according to its specific language.

Petitioner was indicted, and the government contemporaneously initiated a civil action under § 1345 to seize petitioner's assets. The government claimed that petitioner committed what is called "a Federal health care offense," establishing one of the predicates to use of this forfeiture statute. However, the courts below failed to determine whether the other preconditions were met, and misapplied the statute in other respects as well.

A. The District Court Misapplied Section 1345.

The district court granted an *ex parte* Motion for a Temporary Restraining Order and later issued an Order setting out its opinion, together with a Preliminary Injunction preventing disposing of property well beyond the scope of tainted assets.[10]

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[9] http://www.justice.gov/criminal/afmls/pubs/pdf/statutes2013.pdf.

[10] Luis was enjoined:

> 2. From ... disposing of ... any moneys ... that are **proceeds or profits** from Defendant Luis's Federal health care offenses **or property of an equivalent value** of such **proceeds**

The prerequisites for the government to file a civil action under § 1345[11] to enjoin violation of a "Federal health care offense" appears to have been met. However, to seize assets, the district court must first find that the defendant is:

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or profits; [and]

3. From ... disposing of ... assets, real or personal ... **up to the equivalent value** of the **proceeds** of the Federal health care fraud (**$45 million**). [Pet. App. at 6 (emphasis added.]

[11] 18 U.S.C. § 1345(a) states in full:

(1) **If** a person is--

(A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a **conspiracy to defraud the United States** or any agency thereof), or 1001 of this title;

(B) committing or about to commit a **banking law violation** (as defined in section 3322(d) of this title); or

(C) committing or about to commit a **Federal health care offense**;

the Attorney General may commence a **civil action** in any Federal court to **enjoin** such violation.

(2) **If** a person is alienating or disposing of property, or intends to alienate or dispose of **property, obtained as a result of** a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense **or property which is traceable to such violation**, the Attorney General may commence a **civil action** in any Federal court--

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to--

(i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property **or property of equivalent value**; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.... [Emphasis added.]

> alienating or disposing of property, or intends to alienate or dispose of property, obtained **as a result of** a banking law violation ... or a Federal health care offense or property which is **traceable to such violation**.... [18 U.S.C. § 1345(a)(2) (emphasis added).]

Thus, section 1345 requires the court to find that the person is disposing of, or intends to dispose of, property which has been taken illegally — not property which he legitimately owns. To that end, the statute assumes that a person has assets of two types, which we term Type I and Type II assets:

> (i) **Type I assets** are those obtained "as a result of" or "traceable to" illegal behavior. Even if these assets are in the possession of a defendant, the government has a superior property interest in such property based on the theory that it was, essentially, stolen from the government.
>
> (ii) **Type II assets** are those obtained in legitimate ways, which assets remain under a person's full ownership and control. Over these Type II assets, the government has no property interest whatsoever.

Even a person under federal criminal indictment is at complete liberty to expend some or all of his Type II assets without triggering the district court's powers under § 1345. A district court may exercise its powers under § 1345 only if it first finds that a person has alienated, or threatens to alienate, property over which the government claims a superior property

interest — that is, the person is jeopardizing Type I assets.

From its opinion and the evidence discussed therein, it is by no means clear that the district court had a record sufficient to make such a finding, or even that it made such a finding. When discussing the dissipation of assets, the district court references the testimony of an FBI Special Agent who spoke of transferring funds and purchasing "luxury items, real estate, automobiles, and to travel" — never testifying whether these expended assets were tainted or untainted.[12] Moreover, the district court made no distinction between these two types of assets in its Order, finding only that:

> Defendant Luis has alienated or disposed of property, and unless enjoined could continue to alienate or dispose of property, [i] obtained as a result of a Federal health care offense, [ii] property which is traceable to such violation, **or** [iii] **property of equivalent value**. [*Id.* at Pet. App. 5 (emphasis added).]

Since the three categories of assets were stated in the disjunctive, the Court's finding was only that Luis had disposed of some type of property. But a finding that Luis had disposed of "property of equivalent value" is insufficient under § 1345 to vest the district court with

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[12] Although the district court peppers its analysis with claims of lavish living by Petitioner, this alone does not demonstrate that Type I assets were jeopardized, and is well short of the required statutory finding. Pet. App. at 13-14.

authority to enter any type of restraint on Petitioner's assets.

B. The District Court Improperly Determined the Amount of the "Proceeds or Profits" of the Allegedly Illegal Activity.

The district court relied on statements drawn from the hearing and the declarations before the court, which were ambiguous at best, concluding: "Luis also received approximately $4,490,000 of the funds directly" and "Medicare paid [Luis' companies] $45 million dollars [sic], only a fraction of the funds were located." Pet. App. 14. The district court clearly viewed "the proceeds of the Federal health care fraud [to be] ($45 million)." Pet. App. 6. Disregarding Petitioner's showing that the claimed fraud involved only a portion of the total billings of $45 million, and relying only on "the affidavit of a law enforcement officer," the court found that "there is probable cause to believe that ... $45 million was obtained illegally as a result of those offenses." Pet. App. 14-15. *See also*, Pet. App. 15, n.3.

The Court of Appeals adopted the position of the district court, finding that it had "authority to restrain 'property of equivalent value' to that actually traceable to the alleged fraud." Pet. App. 2. However, the district court conducted no tracing in accepting the government's theory that of the $45 million in gross receipts received by Petitioners' business could be seized." Certainly, the district court's assumption that every penny received by Petitioner's companies was fraudulently obtained was unsupported.

The district court erroneously interpreted § 1345 as though it authorized the forfeiture of the "gross proceeds" of an offense. Although a broader power arguably is contained in an asset forfeiture statute governing federal health care offenses, that statute, 18 U.S.C. § 982(a)(7), only applies **after conviction**, and is limited to "gross proceeds traceable." [13] No such power to seize "gross proceeds" exists under § 1345 before conviction.

Circumventing the language of § 1345, which limits the injunction to "proceeds or profits," the district court wrongly assumed that there was a statutory basis for a *de facto* tainting of all assets of Petitioner.

C. The District Court Improperly Allowed the Seizure of Untainted Funds.

The district court's powers under § 1345 are limited:

> (A) to **enjoin such** alienation or disposition of property; or
> (B) for a **restraining order** to--
> (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any **such property** or **property of equivalent value**; and
> (ii) appoint a temporary receiver to administer such restraining order. [Emphasis added.]

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[13] *See also* 21 U.S.C. § 853(p) (relating to "substitute assets").

Subsection (A) is clear — the district court may only **enjoin** "**such** alienation or disposition of property" — which refers back to property "obtained **as a result of** a banking law violation ... or a Federal health care offense ... or property which is **traceable to** such violation" — and no injunction could extend further to other property. (Emphasis added.)

However, Section (B) appears to extend a court's powers to issue "**restraining order**[s]," to "property of equivalent value." (Emphasis added.) The district court assumed that this section allowed the seizure of untainted assets throughout the trial, but such an interpretation conflicts with other principles and precedents.

First, other courts acting under § 1345 have interpreted this language so as to stop the government from using the statute to achieve a very different purpose from the one for which such statutes were written. Pretrial asset seizure was never designed to ensure that all of an individual's assets were available for collection should the government obtain a criminal forfeiture after a conviction. It was designed only to protect the government's current alleged superior property interest in specific property, not some

speculative future property interest.[14] *See* discussion *infra*, Section III.

Second, in subsections (A) and (B), Congress distinguished between the court's powers in granting a temporary restraining order and a preliminary injunction. Subsection (A) (using the word "enjoin") would apply only to injunctions (preliminary and permanent) of the sort entered by the district court on June 21, 2013. Section (B) (using the word "restraining order") would apply only to temporary restraining orders (such as entered by the district court on October 3, 2012). This view arguably is consistent with the statute's authorization of the appointment of a "temporary receiver." Under this view, the court could enter a temporary restraining order to freeze temporarily more assets and give the government time to determine which assets were traceable to the crime. Then, once the government had performed such tracing, the injunction would be narrowed to apply only to those assets in which the government had a superior property interest.[15]

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[14] The word "untainted" does not even appear in the 349-page U.S. Department of Justice's Asset Forfeiture & Money Laundering Statutes compendium. And it appears only once in the Department's 173-page Asset Forfeiture Policy Manual. http://www.justice.gov/criminal/afmls/pubs/pdf/policy-manual-2013rev.pdf.

[15] This view appears to have been rejected in the Eleventh Circuit (DBB) but applied by at least one federal district court (Savran). *See* discussion *infra*.

Third, the district court in Luis held that "1345 permits the restraint of substitute assets...." App. 18. (The Eleventh Circuit also mentions "substitute assets" on Pet. App. 2.) However, the term "substitute assets" nowhere appears in § 1345, as it does in some other forfeiture statutes. The Sixth Circuit found it significant that 21 U.S.C. § 853 has a "substitute asset" provision and 18 U.S.C. § 1345 does not. *See* United States v. O'Brien, 1999 U.S. App. LEXIS 9147, *8-9 (6th Cir. 1999) (emphasis added). Thus, Congress knew how to create a statute which extended explicitly to "substitute assets" as it did in 21 U.S.C. § 853(p), but Congress certainly did not do so in 18 U.S.C. § 1345. In authorizing sequestration of "substitute assets," section 853(p) imposes careful preconditions, such as the unavailability of tainted assets because they are outside of the court's jurisdiction.[16] Under the district court's view, there are no such preconditions under § 1345.

Lastly, although not analyzed in this fashion, section 1345 appears to have been interpreted properly by the Sixth Circuit and several district courts. In those cases, the courts turned back government efforts to freeze untainted assets under § 1345.

In United States v. William Savran & Associates, 755 F. Supp. 1165 (E.D. N.Y. 1991), the government sought to freeze a bank account which contained all of the defendant's money, from both legitimate sources

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[16] As Petitioner has noted, only one Circuit has determined that § 853 authorizes the pre-trial restraint of substitute assets. Pet. at 7, n.1.

and from the alleged criminal activity. The district court determined that the account could remain frozen only until the government proved the specific amounts subject to forfeiture. Savran at 1185.

Similarly, the Sixth Circuit in United States v. Brown, 988 F.2d 658 (6th Cir. 1993), held that, pursuant to § 1345, the "court may freeze only those assets related to the alleged fraud." The Luis district court below cited other aspects of the Brown decision (*see* Pet. App. 10-11), but never mentioned Brown's premise that untainted assets may not be frozen. The Eleventh Circuit below never mentioned Brown.

In United States v. Sriram, 147 F. Supp. 2d 914 (N.D. IL. 2001), the district court rejected an effort by the government to freeze assets above and beyond assets traceable to the charged Medicare fraud. (The government was seeking treble damages.) The court analyzed the legislative history and other decisions applying § 1345, and concluded that "the cases do uniformly state that the assets frozen must be 'traceable to the allegedly illicit activity.'... These statements are consistent with this Court's statutory interpretation that under Section 1345 only those assets traceable to the alleged violation may be frozen." Sriram at 947 (citing Brown; United States v. Fang, 937 F Supp. 1186 (D. Md. 1996); and United States v. Quadro Corp., 916 F. Supp. 613 (E.D. Tex. 1996)).

Having interpreted § 1345 to apply to untainted assets, the court below unnecessarily raised serious constitutional questions that would be avoidable by a

less aggressive interpretation, as discussed in Section III, *infra*.[17]

II. THE COURT OF APPEALS BASED ITS RULING ON FOUR DECISIONS, NONE OF WHICH DECIDED, OR EVEN ADDRESSED, THE ISSUE PRESENTED.

The Court of Appeals stated that it would "review questions of law, such as a statute's constitutionality and whether a preliminary injunction violates an individual's constitutional rights, *de novo*." Pet. App. 3. However, the court was lax — if not careless — in discharging its responsibility, giving only cursory attention to Petitioner's claims, and no thoughtful attention whatsoever to the holdings of the authorities on which it relied, concluding:

> [t]he arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley v. United States*, ___U.S. ___, 134 S. Ct. 1090, 1105, 188 L. Ed. 2d 46 (2014); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631, 109 S. Ct. 2646, 2655, 109 S. Ct. 2667, 105 L. Ed. 2d 528 (1989); *United States v. Monsanto*, 491 U.S. 600, 616, 109 S. Ct. 2657, 2667, 105 L. Ed. 2d 512 (1989); and *United States v. DBB, Inc.*, 180 F.3d 1277, 1283-84 (11th Cir. 1999). Accordingly, we affirm the district court's

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[17] *See* A. Scalia & B. Garner, Reading Law (West: 2012), pp. 247-51.

> order granting the government's motion for a preliminary injunction. [Pet. App. at 3.]

None of these four decisions addressed the government's claimed authority to seize untainted assets.

Kaley v. United States involved seizure of an indicted defendant's assets prior to trial under 21 U.S.C. § 853(e), which governs criminal forfeitures. Unlike here, no untainted assets were seized in Kaley. Indeed, writing for the Court, Justice Kagan described the purpose of criminal forfeitures as being "imposed upon conviction to confiscate assets used in or gained from certain serious crimes." Kaley, 134 S.Ct. at 1094. "There must be probable cause to think ... that the property at issue has the requisite connection to that crime." *Id.* at 1095. The Court noted that, "[a]t oral argument, the Government agreed that a defendant has a constitutional right to a hearing on" whether "the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Id.* at 1095 n.3. The Court noted that "the Government sought a restraining order to prevent the Kaleys from transferring any assets traceable to or involved in the alleged offenses ... except as to $63,000 that it found ... was not connected to the alleged offenses." *Id.* at 1095-96.

Caplin & Drysdale v. United States also involved 18 U.S.C. § 853, which "authorizes forfeiture to the Government of 'property constituting, or derived from ... proceeds ... obtained' from drug-law violations...." *Id.* at 619-20. Justice White stated that "[t]he

forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." *Id.* at 625. Nevertheless, "[t]here is no constitutional principle that gives one person the right to give another's property to a third party [attorney]." *Id.* at 628. United States v. Monsanto, decided the same day as Caplin & Drysdale, involved a pretrial seizure under 18 U.S.C. § 853, and a claim that the statute should be interpreted to allow use of seized tainted funds to retain counsel. Justice White described this statute as providing "that a person convicted of the offenses charged ... 'shall forfeit ... any property' that was derived from the commission of these offenses." *Id.* at 607. The Court found "no exemption" from this provision "for assets which a defendant wishes to use to retain an attorney." *Id.* at 614. Neither case seized untainted assets.

United States v. DBB, Inc. did involve 18 U.S.C. § 1345, and an injunction which would allow the seizure of "property of equivalent value" as in the instant case. However, the court made clear that "[b]oth parties agree that subsection (a)(2)(A) authorizes injunctions to freeze property obtained through fraud or traceable to fraud and that subsection (a)(2)(B) authorizes TROs that freeze property of equivalent value."[18] The only issue litigated was "whether subsection (a)(2)(B) ... also authorizes the court to grant injunctions" to freeze

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[18] This statement is consistent with Savran, which permitted a TRO against an entire bank account pending a hearing to establish which amounts were tainted and untainted. Savran at 1185.

those categories of property. The defendant challenged only whether a seizure of "property of equivalent value" was permitted in an injunction, rather than a restraining order. The government's authority to seize "property of equivalent value" in some form was conceded. The parties never briefed, and the Court of Appeals never decided, whether "property of equivalent value" could be seized, and thus the issue could not have been "foreclosed" to the Petitioner in the present case, as claimed by the panel below.

III. THE COURTS BELOW HAVE ERRONEOUSLY SUBSTITUTED PRAGMATISM FOR THE COMMON LAW OF PROPERTY.

In 1989, the Eleventh Circuit decided an asset forfeiture case under § 1345. The court began by stating a useful maxim: "[w]hen the right point of view is discovered, the problem is more than half solved." United States v. Bissell, 866 F.2d 1343, 1350 (11th Cir. 1989) (citations omitted). That decision did not involve a seizure of untainted assets,[19] but it proposed the right starting point to evaluate asset forfeiture cases. First, the Bissell court stated the constitutional problem:

> Attachment, sequestration, and other restraint placed upon property, prior to judgment may, when done **improperly**, amount to the **taking**

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[19] Bissell at 1350 ("[A]ppellants do not contend that the government wrongfully restrained assets having no connection with criminal activity.").

> **of property without due process of law.** [*Id.* (emphasis added)]

To avoid a Fifth Amendment violation, the Court explained, the government is not entitled to a pre-judgment seizure of assets on the theory that "government's efforts [were] to collect an **indebtedness**." Assets could only be seized where "**none of the defendants have ever owned any of these assets.**" Bissell at 1350 (emphasis added).

The Court of Appeals drew on an analogy from another court to make its point:

> Suppose a bank is robbed and **$100,000 taken**. A defendant is **arrested in possession of $100,000** and nothing more. The defendant protests his innocence and claims, **without the slightest proof**, that the $100,000 that was in fact a gift from a friend. Surely no one will contend that the $100,000 must be made available to pay the defendant's lawyer, and not be kept available for return to the bank in the event the defendant is found guilty. [Bissell at 1351 (emphasis added).]

The district court below purported to base its decision on the very same bank robber illustration used by the Bissell court, but the decision it reached could not have been more antithetical to the principles implicit in the Eleventh Circuit opinion. The district court below explained "[t]he reason the bank robber is not permitted to use the $100,000 to hire a lawyer is obvious. The money does not belong to him." So far so

good, but then in continuing to expound on the hypothetical, the district court revealed that it had no understanding whatsoever of the rule that had been articulated by the Eleventh Circuit:

> But suppose the bank robber in the example above spent the $100,000 that he stole. It just so happens, however, that he has **another $100,000 he obtained legitimately**. Should his decision to spend the $100,000 he stole mean that he is free to hire counsel with the other $100,000 when Congress has authorized restraint of those substitute assets? The **reasonable** answer is no. **The bank has the right to have those substitute, untainted assets kept available for return as well**. Therefore ... the most **reasonable** conclusion is that there is no Sixth Amendment right to use untainted, substitute assets to hire counsel. [Pet. App. at 32 (emphasis added).]

This outcome, the district court opined is "reasonable" (*id.*) and "common sense." *Id.* at 31. Fortunately, no judge's "common sense" may vary the principle that where the government does not have a superior claim to property, it cannot exercise control over that property. This is the principle that the Eleventh Circuit had correctly articulated, but which the district court below mangled in upholding the government's asset seizure of untainted goods.

IV. THE FOUNDERS NEVER INTENDED THE PEOPLE TO BE IN FEAR OF THE FEDERAL GOVERNMENT AS THEY ARE NOW.

If the decisions of the courts below are allowed to stand, no American can feel confident that he will be able to obtain a robust legal defense if charged with a federal crime. An individual's ability to use his own resources to retain counsel of choice to present an aggressive defense will be at the mercy of the prosecutor and the district court judge. The common law of property which undergirds both the Fifth and Sixth Amendments will have been jettisoned based on pragmatic considerations. The government's speculative future interest in a defendant's property will be deemed superior to the defendant's current ownership of that property.

Since asset forfeiture crept into the federal criminal justice system in 1971, the scope and extent of these laws has grown exponentially, as Congress has sought, and continues to seek, to empower prosecutors with more tools to combat crime. The law of unintended consequences has been given full sway. In 1996, enjoying the full support of the Supreme Court, a wife learned that the family car could be forfeited to Michigan on a nuisance theory if her husband used it even once for an assignation with a prostitute. Tina Bennis v. Michigan, 516 U.S. 442 (1996). There are now hundreds of federal asset forfeiture statutes. The U.S. Department of Justice devotes increasing effort to training federal prosecutors to take assets from the American people. Fortunately, the American people are awakening to

the innumerable abuses that are being visited upon them by their government in the name of fighting crime.[20]

Asset forfeiture has become the tip of the spear wielded by prosecutors against Americans in a federal criminal justice system designed to extract guilty pleas and collect financial awards. Polls report that Americans now, more than ever, live in fear of the federal government and what it is capable of doing to them and other law abiding persons.[21] Many Americans believe that the greatest threat to their liberty comes from the very entity that was put in place to protect them.

It was never meant to be this way. The U.S. Constitution hardly provides unquestioned support for the type of robust federal criminal code that has developed in recent years.[22] However, Congress' promiscuous use of the Commerce Clause, combined with the courts' neglect of the Tenth Amendment, has

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[20] M. Sallah, R. O'Harrow, & S. Rich, "Stop and seize," *Washington Post* (Sept. 6, 2014), http://www.washingtonpost.com/sf/investigative/2014/09/06/stop-and-seize.

[21] *See, e.g.*, "37% of Voters Fear the Federal Government," Rasmussen Reports (Apr. 18, 2014), http://tinyurl.com/mjnm6br.

[22] Indeed, the Constitution expressly authorizes Congress to create only a handful of federal criminal offenses, such as counterfeiting (U.S. Const., Art. I, Sec. 8, cl. 6), piracy (*id.*, Art. I, Sec. 8, cl. 9), and treason (*id.*, Art. II, Sec. 4; Art. III, Sec. 4). A few additional categories of federal crimes can be implied from other powers, such as tax fraud (*id.*, Art. I, Sec. 8, cl.1), and immigration fraud (*id.*, Art. I, Sec. 8, cl. 4).

enabled the federal government to occupy the field of criminal law that was supposed to be reserved to the states. There are now so many federal crimes that even the federal government itself has lost count, but all estimates put it in the many thousands.[23]

In an era where even law-abiding persons can unwittingly commit serious federal crimes,[24] the federal government's tentacles touch every aspect of daily life. Federal prosecutors already have a fearsome arsenal of weapons at their disposal to use against anyone who enters their crosshairs. Prosecutors "stack" charges for the same set of conduct, so long as each crime requires proof of an additional element that another does not.[25] Prosecutors often over-charge crimes that they know they could never hope to prove beyond a reasonable doubt, so that they retain bargaining power to accept guilty pleas for lesser offenses. M. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 314 (Dec. 1975)

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[23] *See* G. Fields & J. Emshwiller, "Many Failed Efforts to Count Nation's Federal Criminal Laws," *Wall Street Jour.* (Jul. 23, 2011).

[24] *See* H. Silverglate, Three Felonies A Day: How the Feds Target the Innocent (Encounter Books: 2011).

[25] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

at 294. If prosecutors have the additional incentive to overcharge so that they can seize any and all untainted assets, the risk that no one will have any meaningful right to their day in court grows exponentially.

CONCLUSION

Giving the federal government the power to seize tainted assets of a defendant, or even a convicted criminal, is a fearsome power, but can be understood if the assets seized are the fruits of the crime. It is quite another to grant the government the power to seize the assets of a defendant which are unrelated to the crime. Not only is such a power "unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial" (Caplin & Drysdale at 635, Blackmun, J. dissenting), but also it undermines centuries of the common law of property. The petition should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 14-419

In the

Supreme Court of the United States of America

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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Petition of Writ of Certiorari filed on October 7, 2014
Writ of Certiorari granted on June 8, 2015

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Relevant Docket Entries
United States District Court
Southern District of Florida
Case No. 12-CV-23588-HUCK

Date Filed	DE#	Docket Text
Oct 2 2012	1	EX PARTE COMPLAINT for Temporary Restraining Order and Preliminary Injunction against Myriam Acevedo Sila Luis Elsa Ruiz.. USA Filer No Filing Fee Required filed by United States of America. (Attachments: # 1 Civil Cover Sheet)(nc) (Entered: 10/02/2012)
Oct 2 2012	4	EMERGENCY EX PARTE MOTION for Temporary Restraining Order (Responses due by 10/19/2012) and Preliminary Injunction and Supporting Memorandum of Law by United States of America. (Attachments: # 1 Text of Proposed Order)(nc) (Entered: 10/02/2012)
Oct 2 2012	5	DECLARATION OF Special Agent Clint E. Warren In Support of 4 EMERGENCY EX PARTE MOTION for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law by United States of America. (nc) (Entered: 10/02/2012)

Oct 3 2012	11	TEMPORARY RESTRAINING ORDER re 4 Emergency Ex Parte Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law by United States of America. This temporary restraining order shall remain in force until the close of business on the 13th day of October 2012 or at such later date as may be extended by the Court or agreed upon by the parties. (Preliminary Injunction Hearing set for 10/12/2012 04:00 PM in Miami Division before Judge Cecilia M. Altonaga.) Signed by Senior Judge Paul C. Huck on 10/3/2012. (See Order for full details) (nc). (Entered: 10/03/2012)
Nov 5 2012	30	ORDER granting 29 Motion to Modify Temporary Restraining Order Signed by Senior Judge Paul C. Huck on 11/5/2012. (cqs) (Entered: 11/05/2012)
Nov 7 2012	39	Motion/ Notice To Transfer Related Civil Action To The Docket Of Jusge [sic] Cooke by Sila Luis (Attachments: # 1 Exhibit Motion to Transfer Related Civil Action to the Docket of Judge Cooke)(Srebnick Howard)Event Modified on 11/8/2012 (cqs). (Entered: 11/07/2012)

Nov 16 2012	46	Corrected MOTION for Release of Funds for the Defense of the Related Criminal Case by Sila Luis. (Srebnick Howard) (Entered: 11/16/2012)
Nov 21 2012	49	RESPONSE in Opposition re 46 Corrected MOTION for Release of Funds for the Defense of the Related Criminal Case filed by United States of America. (Attachments: # 1 Exhibit A)(Torres, Susan) (Entered: 11/21/2012)
Dec 14 2012	58	MOTION for Discovery Subpoena Duces Tecum for Medical Records Pursuant to Rule 17 Fed.R.Crim.P by Sila Luis. Responses due by 12/31/2012 (Attachments: # 1 Exhibit Civil Complaint (Highlighted) # 2 Exhibit Indictment (Highlighted) # 3 Exhibit Patient Survey by Gustavo Guerrero # 4 Exhibit Letter from DOJ to Dr. Krieger # 5 Transcripts Transcript of Pretrial Detention Hearing)(Srebnick Howard) (Entered: 12/14/2012)
Dec 26 2012	64	NOTICE/RENEWED Motion to Transfer Civil Action to Docket of Judge Cooke by Sila Luis re 33 Notice (Other) 39 Motion for Miscellaneous Relief (Srebnick Howard)Text Modified on 12/27/2012 (cqs). (Entered: 12/26/2012)

Dec 27 2012	66	NOTICE by United States of America of Filing Supplemental Declaration of Clint E. Warren (Attachments: # 1 Affidavit)(Torres, Susan) (Entered: 12/27/2012)
Dec 28 2012	71	RESPONSE to Motion re 58 MOTION for Discovery Subpoena Duces Tecum for Medical Records Pursuant to Rule 17 Fed.R.Crim.P. filed by United States of America. Replies due by 1/7/2013. (Torres Susan) (Entered: 12/28/2012)
Jan 17 2013	86	Defendant's MOTION to Compel Discovery and Exclude Hearsay by Sila Luis. Responses due by 2/4/2013 (Srebnick Howard) (Entered: 01/17/2013)
Jan 25 2013	90	RESPONSE in Opposition re 86 Defendant's MOTION to Compel Discovery and Exclude Hearsay filed by United States of America. (Attachments: # 1 Exhibit A)(Torres Susan) (Entered: 01/25/2013)
Feb 1 2013	96	NOTICE by United States of America of Filing Second Supplemental Declaration of Clint E. Warren (Attachments: # 1 Affidavit # 2 Exhibit A # 3 Exhibit B)(Torres Susan) (Entered: 02/01/2013)
Feb 1 2013	97	ORDER granting 58 Motion for Discovery Signed by Senior Judge Paul C. Huck on 2/1/2013. (cqs) (Entered: 02/04/2013)

Feb 5 2013	99	NOTICE by United States of America of Filing Proposed Findings of Fact and Conclusions of Law (Attachments: # 1 Text of Proposed Order)(Torres Susan) (Entered: 02/05/2013)
Feb 15 2013	102	Proposed Findings of Fact and Proposed Conclusions of Law by Sila Luis. (Attachments: # 1 Exhibit)(Srebnick Howard) (Entered: 02/15/2013)
Feb 22 2013	103	RESPONSE/REPLY to 102 Proposed Findings of Fact & Conclusions of Law of Defendant Sila Luis by United States of America. (Attachments: # 1 Exhibit A # 2 Exhibit B)(Torres Susan) (Entered: 02/22/2013)
Mar 29 2013	110	RESPONSE/REPLY to 103 Response/Reply (Other) 102 Proposed Findings of Fact by Sila Luis. (Srebnick Howard) (Entered: 03/29/2013)
Jun 21 2013	124	ORDER denying 46 Motion for Release of Funds; granting 4 Motion for Preliminary Injunction Signed by Senior Judge Paul C. Huck on 6/21/2013. (tas) (Entered: 06/21/2013)
Jun 24 2013	125	PRELIMINARY INJUNCTION as to Defendant Sila Luis Signed by Senior Judge Paul C. Huck on 6/24/2013. (cqs) (Entered: 06/24/2013)

Aug 15 2013	126	Notice of Interlocutory Appeal as to 125 Preliminary Injunction 124 Order on Motion for Release of Funds Order on Motion for Preliminary Injunction by Sila Luis. Filing fee $455.00 receipt number 113C-5976982. Within fourteen days of the filing date of a Notice of Appeal the appellant must complete the Eleventh Circuit Transcript Order Form regardless of whether transcripts are being ordered [Pursuant to FRAP 10(b)]. For information go to our FLSD website under Transcript Information. (Srebnick Scott) (Entered: 08/15/2013)
Sep 26 2013	135	TRANSCRIPT of probable cause hearing held on 2.6.2013 before Senior Judge Paul C. Huck 1-129 pages re: 126 Notice of Interlocutory Appeal Court Reporter: Robin Dispenzieri 305-523-5659 / Robin_Dispenzieri@flsd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased by contacting Robin Dispenzieri before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 10/21/2013. Redacted Transcript Deadline set for 10/31/2013. Release of Transcript Restriction set for 12/30/2013. (rd) (Entered: 09/26/2013)

Aug 4 2014	150	MANDATE of USCA AFFIRMING the district court's order granting the government's motion for preliminary injuction with court's opinion; re 126 Notice of Interlocutory Appeal,, filed by Sila Luis; Date Issued: 8/4/2014; USCA Case Number: 13-13719-DD (mc) (Entered: 08/05/2014)

Relevant Docket Entries
United States Court of Appeals
for the Eleventh Circuit
Case No. 13-13719

May 1 2014	Opinion issued by court as to Appellant Sila Luis. Decision: Affirmed. Opinion type: Non-Published. Opinion method: Per Curiam.
May 1 2014	Judgment entered as to Appellant Sila Luis.
May 21 2014	Petition for rehearing en banc (with panel rehearing) filed by Appellant Sila Luis. (ECF: Scott Srebnick)
Jul 9 2014	ORDER: The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled, the Petition(s) for Rehearing En Banc filed by Appellant Sila Luis are DENIED. [7214213-1]
Aug 4 2014	Mandate issued as to Appellant Sila Luis.

Case 1:12-cv-23588-PCH Document 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 12-23588-CIV-HUCK

UNITED STATES OF AMERICA,

Plaintiff,

v.

SILA LUIS, ELSA RUIZ, and MYRIAM ACEVEDO,

FILED UNDER SEAL
(Filed Oct. 02, 2012)

Defendants.

_____/

UNITED STATES' EX PARTE COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTION

Plaintiff, the United States of America, by and through the undersigned attorneys, hereby alleges as follows:

JURISDICTION AND VENUE

1. The United States brings this action for a temporary restraining order, preliminary and permanent injunction, and other equitable relief pursuant to 18 U.S.C. § 1345.

2. This Court has subject matter jurisdiction over this action pursuant to 18 U.S.C. § 1345, and 28 U.S.C. §§ 1331 and 1345.

3. This Court has personal jurisdiction over Defendants and venue is proper in this District pursuant

to 28 U.S.C. §§ 1391(b) and 1391(c) because Defendants reside in this District or transact business in this District and Defendants' actions that gave rise to this case all occurred in this District.

PARTIES

4. Plaintiff is the United States of America. At all times material to this action, the Department of Health and Human Services ("HHS") was an agency and instrumentality of the United States, and the Centers for Medicare and Medicaid Services ("CMS") was the component agency of HHS that administers and supervises the Health Insurance Program for the Aged and Disabled established by Title XVIII of the Social Security Act ("Act"), 42 U.S.C. §§ 1395 et seq. ("Medicare Program").

5. Defendant Sila Luis, a resident of Miami-Dade County, Florida, was president of LTC. Sila Luis was also an owner and operator of LTC and Professional Home Care.

6. Defendant Elsa Ruiz, a resident of Miami-Dade County, Florida, was an office administrator at LTC and an owner of Professional Home Care.

7. Defendant Myriam Acevedo, a resident of Miami-Dade County, Florida, was an office administrator at LTC.

8. LTC was a Florida corporation that did business in Miami-Dade County, Florida, as an HHA that purported to provide home health care and physical therapy services to eligible Medicare beneficiaries.

9. As of 2003, Luis was listed as the president, administrator, owner, registered agent, director, officer

and managing employee in LTC's Medicare Application and Articles of Incorporation. In April 2006, LTC obtained Medicare provider number 10-8042, authorizing LTC to submit claims to Medicare for home health-related benefits and services. Luis and Acevedo had signatory authority on the LTC corporate bank accounts.

10. Professional Home Care was a Florida corporation that did business in Miami-Dade County, Florida, as an HHA that purported to provide home health care and physical therapy services to eligible Medicare beneficiaries.

11. In October 2007, Professional Home Care obtained Medicare provider number 10-8475, authorizing Professional Home Care to submit claims to Medicare for home health-related benefits and services. As of September 2008, Ruiz has been listed as the administrator, director, owner, and vice president on the Medicare application and Articles of Incorporation for Professional Home Care. Ruiz had signatory authority on Professional Home Care's bank accounts.

THE MEDICARE PROGRAM

12. The Medicare Program ("Medicare") is a federal health care program providing benefits to persons who are over the age of sixty-five or disabled. Medicare is administered by the Centers for Medicare and Medicaid Services ("CMS"), a federal agency under the United States Department of Health and Human Services. Individuals who receive benefits under Medicare are referred to as Medicare "beneficiaries."

13. Medicare is a "health care benefit program," as defined by 18 U.S.C. § 24(b).

Medicare Coverage of Home Health Services

14. At all times relevant to this investigation, "Part A" of the Medicare program covered certain eligible home health care costs for medical services provided by a home health agency ("HHA") to beneficiaries who required home health services because of an illness or disability that caused them to be homebound. Payments for home health care medical services under Medicare Part A were typically made directly to an HHA or provider based on claims submitted to the Medicare program for qualifying services that had been provided to eligible beneficiaries, rather than to the beneficiary.

15. Physicians, clinics and other health care providers, including HHAs, that provided services to Medicare beneficiaries were able to apply for and obtain a "provider number." A health care provider that received a Medicare provider number was able to file claims with Medicare to obtain reimbursement for services provided to beneficiaries. A Medicare claim was required to set forth, among other things, the beneficiary's name and Medicare information number, the services that were performed for the beneficiary, the date the services were provided, the cost of the services, and the name and identification number of the physician or other health care provider who ordered the services.

16. The Medicare Part A program reimbursed 100% of the allowable charges for participating HHAs providing home health care services only if the patient qualified for home health benefits. A patient qualified for home health benefits only if:

a. the patient was confined to the home, also referred to as homebound;

b. the patient was under the care of a physician who specifically determined there was a need for home health care and established the Plan of Care ("POC"); and

c. the determining physician signed a certification statement specifying that the beneficiary needed intermittent skilled nursing services, physical therapy, or speech therapy and that the beneficiary was confined to the home; that a POC for furnishing services was established and periodically reviewed; and that the services were furnished while the beneficiary was under the care of the physician who established the POC.

17. HHAs were reimbursed under the Home Health Prospective Payment System ("PPS"). Under PPS, Medicare paid Medicare-certified HHAs a predetermined base payment for each 60 days that care was needed. This 60-day period was called an "episode of care." The base payment was adjusted based on the health condition and care needs of the beneficiary. This adjustment was done through the Outcome and Assessment Information Set ("OASIS"), which was a patient assessment tool for measuring and detailing the patient's condition. If a beneficiary was still eligible for care after the end of the first episode of care, a second episode could commence. There were no limits to the number of episodes of home health benefits a beneficiary could receive as long as the beneficiary continued to qualify for home health benefits.

18. CMS did not directly pay Medicare Part A claims submitted by Medicare-certified HHAs. CMS contracted with different companies to administer the Medicare Part A program throughout different parts of the United States. In the State of Florida, CMS contracted with Palmetto Government Benefits Administrators ("Palmetto") to

administer Part A HHA claims. As administrator, Palmetto was to receive, adjudicate, and pay claims submitted by HHA providers under the Part A program for home health claims.

19. In order to be reimbursed, the HHA would submit a Request for Anticipated Payment ("RAP") and subsequently receive a portion of its payment in advance of services being rendered. At the end of a 60 day episode, when the final claim was submitted, the remaining portion of the payment would be made. As explained in more detail below, "Outlier Payments" are additional PPS payments based on visits in excess of the norm. Palmetto paid Outlier Payments to HHA providers under PPS where the providers' RAP submissions established that the cost of care exceeded the established Health Insurance Prospective Payment System ("HIPPS") code threshold dollar amount.

20. Medicare regulations allowed certified home health agencies to subcontract home health care services to nursing companies, registries, or groups (nursing groups), which would, in turn, bill the certified home health agency. That certified home health agency would then bill Medicare for all services provided to the patient by the subcontractor. The HHA's professional supervision over arranged-for services required the same quality controls and supervision of its own employees.

21. For insulin-dependant diabetic beneficiaries, Medicare paid for insulin injections by an HHA agency when a beneficiary was determined to be unable to inject his or her own insulin and the beneficiary had no available care-giver able and willing to inject the beneficiary. Additionally, for beneficiaries for whom occupational or

physical therapy was medically necessary, Medicare paid for such therapy provided by an HHA. The basic requirements that a physician certify that a beneficiary is confined to the home or homebound and in need of home health services, as certified by a physician, was a continuing requirement for Medicare to pay for such home health benefits.

22. While payment for each episode of care was adjusted to reflect the beneficiary's health condition and needs, Medicare regulations contained an "outlier" provision to ensure appropriate payment for those beneficiaries that had the most extensive care needs, which may result in an Outlier Payment to the HHA. These Outlier Payments were additions or adjustments to the payment amount based on an increased type or amount of medically necessary care. Adjusting payments through Outlier Payments to reflect the HHA's cost in caring for each beneficiary, including the sickest beneficiaries, ensured that all beneficiaries had access to home health services for which they were eligible.

Record Keeping Requirements

23. Medicare Part A regulations required HHAs providing services to Medicare patients to maintain complete and accurate medical records reflecting the medical assessment and diagnoses of their patients, as well as records documenting actual treatment of the patients to whom services were provided and for whom claims for reimbursement were submitted by the HHAs. These medical records were required to be sufficient to permit Medicare, through Palmetto and other contractors, to review the appropriateness of Medicare payments made to the HHA under the Part A program.

24. Among the written records required to document the appropriateness of home health care claims submitted under Part A of Medicare was a POC that included the physician order for home health care, diagnoses, types of services/frequency of visits, prognosis/ rehabilitation potential, functional limitations/activities permitted, medications/treatments/ nutritional requirements, safety measures/discharge plans, goals, and the physician's signature. Also required was a signed certification statement by an attending physician certifying that the patient was confined to his or her home and was in need of the planned home health services, and an OASIS.

25. Medicare Part A regulations required provider HHAs to maintain medical records of every visit made by a nurse, therapist, and home health aide to a beneficiary. The record of a nurse's visit was required to describe, among other things, any significant observed signs or symptoms, any treatment and drugs administered, any reactions by the patient, any teaching and the understanding of the patient, and any changes in the patient's physical or emotional condition. The home health nurse, therapist and aide were required to document the hands-on personal care provided to the beneficiary as the services were deemed necessary to maintain the beneficiary's health or to facilitate treatment of the beneficiary's primary illness or injury. These written medical records were generally created and maintained in the form of "clinical notes" and "home health aide notes/observations." Medicare regulations require that home health agencies maintain medical records for at least seven years.

DEFENDANTS' FRAUDULENT SCHEME

26. From January 2006 through July 2009, LTC billed the Medicare program approximately $63 million for home health services for approximately 1495 beneficiaries, and it was paid more than $38 million. Of this $63 million, approximately $56 million represented billings to Medicare for diabetic skilled nursing care and/or physical therapy.

27. From November 2007 through June 2012, Professional Home Care billed the Medicare program approximately $11 million for home health services for approximately 408 beneficiaries, and it was paid more than $7 million. Of this $11 million, approximately $10.5 million represented billings to Medicare for diabetic skilled nursing care and/or physical therapy.

28. According to the Cooperating Witnesses, LTC and Professional Home Care paid kickbacks and bribes to nurses and patient recruiters so that they would place patients with LTC and Professional Home Care. LTC and Professional Home Care would then fraudulently bill Medicare for home health services that were not medically necessary and/or were not provided. Cooperating Witnesses have explained that LTC and Professional Home Care billed primarily for diabetic skilled nursing care and/or physical therapy, because of the high reimbursements they could obtain for these services.

29. Patient recruiters would, in turn, pay Medicare beneficiaries kickbacks for agreeing to be placed at LTC and Professional Home Care. According to the Cooperating Witnesses, recruited beneficiaries accepted these kickbacks in return for allowing LTC and Professional Home Care to fraudulently bill the Medicare

program for home health services that were not medically necessary and/or not provided.

30. Several Cooperating Witnesses have stated that it was common knowledge that Luis owned and operated both LTC and Professional Home Care, and the patients were often interchanged between both companies. Luis and Ruiz were observed by various Cooperating Witnesses giving instructions to employees at LTC and Professional Home Care.

31. According to various Cooperating Witnesses, employees at LTC and Professional Home Care caused patient files to be falsified in order to make it appear that Medicare beneficiaries qualified for and received home health services that in reality were not medically necessary and/or not provided.

32. Virtually all of LTC's and Professional Home Care's billings to Medicare during the relevant time periods were fraudulent, in that they were tainted by unlawful kickbacks, not medically necessary, and/or not provided.

Cooperating Witnesses

33. Cooperating witnesses will provide the following information regarding LTC and Professional Home Care, Luis, Ruiz, and Acevdo, including the following individuals (the "Cooperating Witnesses"):

a. CW1 worked as a nurse for LTC and Professional Home Care from in or about 2007 through in or about 2009;

b. CW2 worked as a nurse and patient recruiter for LTC and Professional Home Care from in or about 2006 through in or about 2009;

c. CW3 worked as a nurse for LTC and as a nurse and patient recruiter for Professional Home Care from in or about 2006 through in or about 2009;

d. CW4 worked as a patient recruiter for LTC and Professional Home Care;

e. CW5 was the owner and operator of a medical clinic that purported to provide prescriptions and POCs for home health care services to Medicare beneficiaries.

f. CW6 worked at LTC as a nurse from approximately 2009 through 2010, and as a patient recruiter for Professional Home Care;

g. CW7 worked as a patient recruiter for LTC and Professional Home Care;

h. CW8 worked as a patient recruiter for Professional Home Care.

Details of the Fraudulent Scheme at LTC and Professional Home Care

CW1 - Nurse

34. CW1 worked as a nurse for LTC and Professional Home Care from in or about 2007 through in or about 2009.

35. CW1 explained to law enforcement that he/she was hired to provide skilled nursing services. But, soon after starting work, CW1 learned that the patients at LTC and Professional Home Care were being paid and did not qualify for the home health services being billed to the Medicare program. CW1 stated that LTC and Professional Home Care sought out purportedly diabetic beneficiaries because of the ability to fraudulently bill the Medicare program for skilled nursing visits two or three times per day per beneficiary, which in some cases resulted in

fraudulent Medicare billings and payments exceeding $14,000 per 60-day period for each beneficiary.

36. CW1 stated that his/her nursing notes indicated that he/she visited the patients two or three times a day, but, in reality, CW1 almost never visited the patients or provided services. CW1 would have the patients sign visit logs for visits that were never provided.

CW2 - Patient Recruiter/Nurse

37. CW2 worked as a nurse and patient recruiter for LTC and Professional Home Care from in or about 2006 through in or about 2009.

38. CW2 explained to law enforcement that he/she was hired to provide skilled nursing services. But, soon after starting work, CW2 learned that the patients at LTC and Professional Home Care were being paid and did not qualify for the home health services being billed to the Medicare program. CW2 stated that LTC and Professional Home Care sought out purportedly diabetic beneficiaries because of the ability to fraudulently bill the Medicare program for skilled nursing visits two or three times per day per beneficiary, which in some cases resulted in fraudulent Medicare billings and payments exceeding $14,000 per 60-day period for each beneficiary.

39. CW2 stated that his/her nursing notes indicated that he/she visited the patients two or three times a day, but, in reality, he/she almost never visited the patients or provided services. CW2 would have the patients sign visit logs for visits that were never provided.

40. CW2 stated he/she worked with an employee from LTC's quality control department to prepare the notes. CW2 explained that he/she paid this employee $2 per

patient note which the LTC employee completed on CW2's behalf. CW2 would provide the LTC employee with weekly blood sugar logs and the LTC employee would complete the notes and add symptoms. CW2 stated that the LTC employee falsified these nursing notes to match the symptoms on the patient's POCs. CW2 stated that this was done by the LTC employee so that the services appeared legitimate, even though the symptoms did not exist. CW2 explained that he/she had the notes completed in the same manner at Professional Home Care.

41. CW2 explained that eventually he/she began recruiting patients for LTC and Professional Home Care. CW2 was paid a kickback of approximately $1300 per patient per month for each patient prescribed skilled nursing visits. CW2 was paid a kickback of approximately $600 per cycle for each patient prescribed physical therapy. CW2 was paid kickbacks for each patient he/she recruited for LTC by Acevedo and for Professional Home Care by Ruiz.

CW3 - Patient Recruiter/Nurse

42. CW3 worked as a nurse and patient recruiter for LTC and Professional Home Care from in or about 2006 through in or about 2009.

43. CW3 explained to law enforcement that he/she was hired to provide skilled nursing services. But, soon after starting work, CW3 learned that the patients at LTC and Professional Home Care were being paid and did not qualify for the home health services being billed to the Medicare program. CW3 stated that LTC and Professional Home Care sought out purportedly diabetic beneficiaries because of the ability to fraudulently bill the Medicare program for skilled nursing visits two or three times per

day per beneficiary, which in some cases resulted in fraudulent Medicare billings and payments exceeding $14,000 per 60-day period for each beneficiary.

44. CW3 stated that his/her nursing notes indicated that he/she visited the patients two or three times a day, but, in reality, he/she almost never visited the patients or provided services. CW31 would have the patients sign visit logs for visits that were never provided.

45. CW3 also worked as the Director of Nursing ("DON") at Professional Home Care from May to October 2007, and then from April 2008 through July 2009. CW3 referred patients to Professional Home Care in exchange for $800 per patient per month ($400 of that kickback was to be paid to the patients). CW3 agreed with Ruiz that he/she would receive $1200 per month for patients that received both skilled nursing and physical therapy services ($700 of that kickback was to be paid to the patients).

CW4 - Patient Recruiter

46. CW4 worked as a patient recruiter for LTC and Professional Home Care. CW4 met directly with Luis, who agreed she would pay CW4 $1600 per patient per cycle for patients prescribed physical therapy and $1500 per patient per month for patients prescribed skilled nursing services. Bank records reflect that LTC paid CW4 $130,000 between October 2007 and July 2009.

47. CW4 and Luis agreed to similar rates for patient referrals to Professional Home Care. Bank records reflect that Professional Home Care has paid CW4 $56,000.

48. CW4 has stated that the patients he/she recruited for LTC and Professional Home Care did not qualify for either skilled nursing care or physical therapy, and that

he/she provided false home health aide certificates. In fact, CW4 never provided any home health aide services, but believes Luis asked for this documentation to make it appear that the recruiting kickback checks were legitimate payments for home health aide services.

CW5 - Owner of Medical Clinic

49. CW5 was the owner and operator of a medical clinic that purported to provide prescriptions and POCs for home health care services to Medicare beneficiaries.

50. CW5 met with Luis, who offered to pay CW5 for patient referrals in the amount of $1400 per patient, per cycle for patients prescribed physical therapy and $1500 per patient, per month for patients prescribed skilled nursing services. CW5 declined this offer.

51. CW5 received a call in 2008 from Luis, who requested that doctors employed by the clinic sign false POCs for Luis in exchange for $500 per POC. CW5 declined this offer.

52. A patient recruiter for LTC also brought patients to the clinic in order to receive prescriptions and POCs for these patients. The recruiter explained that LTC paid him kickbacks for each patient he recruited for LTC; these patients did not qualify for the prescribed medical services.

CW6 - Nurse/Patient Recruiter

53. CW6 worked as a nurse at LTC from approximately 2009 through 2010. CW6 was employed purportedly to provide nursing services at LTC to approximately 15-17 patients. However, these patients did not qualify for skilled nursing home health visits, and many were not even diabetic. CW6 stated that he/she visited the patients at

LTC approximately 2 to 3 times per week, instead of the 14 times he/she indicated in LTC's records. Instead of providing skilled nursing care, CW6 visited the patients only in order to have the patients sign visit logs for days that CW6 was not there.

54. CW6 stated that he/she subsequently began recruiting his/her own patients and approached Acevedo at LTC and discussed recruiting patients for LTC in exchange for kickbacks. Acevedo told CW6 that LTC in general had grown too large and the amount of patients at LTC looked suspicious. Acevedo explained, however, that she had another home health agency where CW6 could bring his/her recruited patients. Acevedo told CW6 to bring his/her patients to Professional Home Care, and directed CW6 to meet with one of the owners of Professional Home Care (as listed in its Articles of Incorporation).

55. CW6 met with the owner, who agreed to pay CW6 approximately $1300 per patient per month for patients prescribed skilled nursing services. The owner also agreed to pay CW6 approximately $1000 per patient per physical therapy cycle.

56. CW6 recruited approximately 5-7 patients for Professional Home Care and also worked there as a nurse. CW6 has admitted that the patients he/she recruited at Professional Home Care did not qualify for the services being billed to Medicare, and many were not even diabetic.

57. False documentation for CW6's recruited patients, including home health prescriptions and signed POCs, were received from a particular doctor. CW6 explained that he/she paid the doctor's office administrator cash kickbacks of $200 per POC in exchange for the doctor's

signature. This doctor was previously indicted in the District Court for the Southern District of Florida (Case no. 11-CR-20113) for his role in other home health frauds, and subsequently pled guilty for prescribing home health services that were not medically necessary.

CW7 - Patient Recruiter

58. CW7 stated that he/she recruited Medicare beneficiaries and paid them kickbacks to participate in the fraudulent schemes at LTC and Professional Home Care. CW7 agreed with another patient recruiter for LTC to transfer CW7's patients from another home health care agency to LTC in exchange for $1200 per month per patient if the patient was prescribed skilled nursing and $1000 if the patient was prescribed physical therapy. Those rates were later increased to $1500 per patient after CW7 threatened to leave LTC and transfer his/her patients to another home health agency.

59. CW7 stated that when he/she moved over to LTC, he/she was joined by CW1, who was assigned to act as the nurse for CW7's patients because CW1 was aware that the patients did not in fact need the skilled nursing services that had been prescribed for them. CW7 met directly with his/her patients and agreed to pay them kickbacks.

60. CW7 also recruited a patient for Professional Home Care, for whom he/she was paid $1200 per month.

CW8 - Patient Recruiter

61. CW8 acted as a patient recruiter for Professional Home Care. CW8 recruited a patient and agreed with Ruiz to receive in exchange approximately $1200 per month for the prescribed skilled nursing services and another approximately $800 per cycle for the physical therapy

services. CW8 was aware that the patient did not require the medical services that were prescribed for him.

DISSIPATION OF ASSETS

62. Both LTC and Professional Home Care completed multiple Authorization Agreements for Electronic Funds Transfer, by which they agreed to accept Medicare payments via direct deposit into their bank accounts at SunTrust Bank, Bank Atlantic, and International Finance Bank. For LTC, the Electronic Funds Transfer Agreements ("EFTs") were signed by Sila Luis, and Myriam Acevedo was listed as the contact person. For Professional Home Care, the EFTs were signed by Sila Luis's husband at the time, and Elsa Ruiz was listed as the contact person.

63. From January 2006 through July 2009, Medicare deposited approximately $38 million into LTC's corporate bank accounts, either through checks or electronic funds transfers.

64. From November 2007 through June 2012, Medicare deposited approximately $7 million into Professional Home Care's corporate bank accounts, either through checks or electronic funds transfers.

65. These deposits by Medicare to LTC and Professional Home Care were in payment for the fraudulent claims submitted by LTC and Professional Home Care.

66. Defendants implemented schemes to transfer these Medicare monies to themselves both directly and by using shell companies. Evidence gathered during the government's investigation indicates that Defendant Luis had family members open shell companies, and that Luis

would transfer monies to these companies. In addition, a recruiter for LTC opened a shell company that would receive checks directly from LTC, money which the recruiter would then use to pay kickbacks to beneficiaries.

67. Defendants also withdrew substantial amounts of cash from LTC's and Professional Home Care's corporate accounts in order to pay kickbacks in furtherance of their fraudulent schemes.

68. Defendants also used Medicare monies for foreign travel, to pay substantial salaries to themselves, to purchase multiple properties, and to purchase luxury cars.

69. For example, of the monies paid by Medicare, Defendant Sila Luis received approximately $4.49 million; Myriam Acevedo received approximately $1.52 million (with almost another million going to a company she owned); and Elsa Ruiz received close to $900,000 (she appears to have received more indirectly). As another example, approximately $225,000 of Medicare monies went to Mercedes Benz for luxury automobiles.

70. From at least January 2006 to the present, Defendants have systematically dissipated the vast majority of the funds received from Medicare by writing checks and making transfers from LTC's and Professional Home Care's bank accounts to themselves, other entities they control, and to third parties to pay for kickbacks, real estate and personal luxury items.

71. Although Medicare has paid Defendants, through LTC and Professional Home Care, $45 million since January 2006, the United States has only been able to locate assets totaling a fraction of that amount. Defendants appear to have dissipated tens of millions of dollars in

Medicare funds, and unless enjoined will continued to dissipate the proceeds of their Medicare fraud.

COUNT I

(18 U.S.C. § 1345 – Injunctive Relief)

72. The United States realleges and incorporates by reference paragraphs 1 through 71 of this Complaint as though fully set forth herein.

73. Among other things, Defendants committed a Federal health care offense, as defined in 18 U.S.C. § 24, by conspiring to commit health care fraud, conspiring to defraud the United States and to pay health care kickbacks, and by actually paying health care kickbacks in connection with a federal health care benefit program, in violation of 18 U.S.C. §§ 1349, 371, and 42 U.S.C. § 1320a-7b(b)(2)(A).

74. Defendants have already dissipated millions of dollars in proceeds of that fraud, and intend to continue dissipating the remainder of the proceeds of the fraud.

43. [*sic*] Defendants' fraud upon Medicare is a fraud against the United States and constitutes a continuing and substantial injury to the United States and its citizens.

75. The United States brings this action to protect Medicare and other funds by restraining Defendants' unlawful fraudulent conduct and to protect and restrain the transfer of funds and assets now in Defendants' hands as ill-gotten gains from their fraud upon the Medicare program.

76. Upon a showing that Defendants are committing or about to commit a Federal health care offense, the United States is entitled, under 18 U.S.C. § 1345(a)(1), to a

temporary restraining order, a preliminary injunction, and a permanent injunction, restraining all future fraudulent conduct and any other action that this Court deems just in order to prevent a continuing and substantial injury to the United States.

77. Upon a showing that defendants are alienating or disposing, or intend to alienate or dispose, property obtained as the result of a Federal health care offense, the United States is entitled, under 18 U.S.C. § 1345(a)(2), to a temporary restraining order, a preliminary injunction, and a permanent injunction, enjoining defendants from alienating, disposing, withdrawing, transferring, removing, dissipating, or disposing of any property obtained as a result of a Federal health care offense, property traceable to such violation, or property of equivalent value.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff United States of America prays that this Court:

Issue a Temporary Restraining Order and Preliminary Injunction in this matter against Defendants, and that a permanent injunction shall be issued forthwith, that orders that Defendants, their agents, servants, employees, attorneys, and all persons acting in concert and participation with Defendants, including all corporations over which they exercise control, be enjoined as follows:

1. From making or conspiring to make any false claims to the Medicare Program or any health care benefit program, or otherwise from committing any Federal health care offense, as defined in 18 U.S.C. § 24;

2. From withdrawing or transferring any moneys or sums presently deposited, or held on behalf of Defendants

by any financial institution, trust fund, or other financial agency, public or private, that are proceeds from false, fictitious, or fraudulent claims made by Defendants, or any moneys of an equivalent value to those taken through false, fictitious, or fraudulent claims;

3. From transferring, selling, assigning, dissipating, concealing, encumbering, impairing or otherwise disposing of, in any manner, assets, real or personal;

4. To preserve all business, financial, and accounting records, including bank records, that detail Defendants' business operation and disposition of any payment that directly or indirectly arose from the payment of money to Defendants on behalf of the Medicare Program;

5. To preserve all medical records, including patient records, which relate to defendants' business operation(s) and/or to services for which claims were submitted to the Medicare Program;

6. To provide an accounting of all assets, within seven calendar days, and to provide on a monthly basis, commencing forthwith, suitable reports detailing its financial condition; and

7. To complete a Financial Disclosure Statement form provided to Defendants by the United States within seven calendar days;

8. For disgorgement and restitution of all of Defendants' ill-gotten gains attributable to their fraud upon the United States; and

9. For such other and further relief as the Court shall deem just and proper.

Dated: October 2, 2012

Respectfully submitted,
WIFREDO A. FERRER
UNITED STATES ATTORNEY

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Case 1:12-cv-23588-PCH Document 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 12-23588-CIV-HUCK

UNITED STATES OF AMERICA,

Plaintiff,

v.

FILED UNDER SEAL
(Filed Oct. 2, 2012)

SILA LUIS, ELSA RUIZ,
and MYRIAM ACEVEDO,

Defendants.

_____/

DECLARATION OF SPECIAL AGENT CLINT E. WARREN IN SUPPORT OF THE UNITED STATES' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI") and have been assigned in this capacity since August 2004. Since being assigned to the FBI's Miami Field Office, I have been primarily involved in the investigation of health care fraud in the South Florida area. During that time, I have investigated numerous matters relating to alleged frauds against health insurance programs, primarily, the Medicare Program, and have attended numerous health care fraud training programs. Specifically, I have investigated numerous home health agencies engaged in fraud.

2. The statements in this Declaration are based upon information I have learned during the investigation of the Defendants and their businesses known as LTC Professional Consultants, Inc. ("LTC") and Professional Home Care Solutions, Inc. ("Professional Home Care"), including, but not limited to, information provided to me by Special Agents of the FBI and Health and Human Services-Office of Inspector General ("HHS-OIG"), public source and business records, bank records and my experience and background as an FBI Special Agent. I have also obtained information from a series of cooperating witnesses. This Declaration is being submitted for the purpose of supporting the temporary restraining order and preliminary injunction sought by the United States in this matter, and I have not included each and every fact known to me concerning this investigation.

3. Based on my training and experience and the facts as set forth in this declaration, there is probable cause to believe that violations of 18 U.S.C. §§ 1349 (conspiracy to commit health care fraud), 371 (conspiracy to defraud the United States and to commit offenses against the United States), and 42 U.S.C. §§ 1320a-7b(b)(2)(B) (paying health care kickbacks), and related crimes have been committed by Defendants Sila Luis, Elsa Ruiz, Myriam Acevedo, and agents or employees of LTC and Professional Home Care.

THE MEDICARE PROGRAM

4. The Medicare Program ("Medicare") is a federal health care program providing benefits to persons who are over the age of sixty-five or disabled. Medicare is administered by the Centers for Medicare and Medicaid Services ("CMS"), a federal agency under the United States Department of Health and Human Services.

Individuals who receive benefits under Medicare are referred to as Medicare "beneficiaries."

5. Medicare is a "health care benefit program," as defined by 18 U.S.C. § 24(b).

Medicare Coverage of Home Health Services

6. At all times relevant to this investigation, "Part A" of the Medicare program covered certain eligible home health care costs for medical services provided by a home health agency ("HHA") to beneficiaries who required home health services because of an illness or disability that caused them to be homebound. Payments for home health care medical services under Medicare Part A were typically made directly to an HHA or provider based on claims submitted to the Medicare program for qualifying services that had been provided to eligible beneficiaries, rather than to the beneficiary.

7. Physicians, clinics and other health care providers, including HHAs, that provided services to Medicare beneficiaries were able to apply for and obtain a "provider number." A health care provider that received a Medicare provider number was able to file claims with Medicare to obtain reimbursement for services provided to beneficiaries. A Medicare claim was required to set forth, among other things, the beneficiary's name and Medicare information number, the services that were performed for the beneficiary, the date the services were provided, the cost of the services, and the name and identification number of the physician or other health care provider who ordered the services.

8. The Medicare Part A program reimbursed 100% of the allowable charges for participating HHAs providing

home health care services only if the patient qualified for home health benefits. A patient qualified for home health benefits only if:

a. the patient was confined to the home (also referred to as homebound);

b. the patient was under the care of a physician who specifically determined there was a need for home health care and established the Plan of Care ("POC"); and

c. the determining physician signed a certification statement specifying that the beneficiary needed intermittent skilled nursing services, physical therapy, or speech therapy and that the beneficiary was confined to the home; that a POC for furnishing services was established and periodically reviewed; and that the services were furnished while the beneficiary was under the care of the physician who established the POC.

9. HHAs were reimbursed under the Home Health Prospective Payment System ("PPS"). Under PPS, Medicare paid Medicare-certified HHAs a predetermined base payment for each 60 days that care was needed. This 60-day period was called an "episode of care." The base payment was adjusted based on the health condition and care needs of the beneficiary. This adjustment was done through the Outcome and Assessment Information Set ("OASIS"), which was a patient assessment tool for measuring and detailing the patient's condition. If a beneficiary was still eligible for care after the end of the first episode of care, a second episode could commence. There were no limits to the number of episodes of home health benefits a beneficiary could receive as long as the beneficiary continued to qualify for home health benefits.

10. CMS did not directly pay Medicare Part A claims submitted by Medicare-certified HHAs. CMS contracted with different companies to administer the Medicare Part A program throughout different parts of the United States. In the State of Florida, CMS contracted with Palmetto Government Benefits Administrators ("Palmetto") to administer Part A HHA claims.As administrator, Palmetto was to receive, adjudicate, and pay claims submitted by HHA providers under the Part A program for home health claims.

11. In order to be reimbursed, the HHA would submit a Request for Anticipated Payment ("RAP") and subsequently receive a portion of its payment in advance of services being rendered. At the end of a 60 day episode, when the final claim was submitted, the remaining portion of the payment would be made. As explained in more detail below, "Outlier Payments" are additional PPS payments based on visits in excess of the norm.Palmetto paid Outlier Payments to HHA providers under PPS where the providers' RAP submissions established that the cost of care exceeded the established Health Insurance Prospective Payment System ("HIPPS") code threshold dollar amount.

12. Medicare regulations allowed certified home health agencies to subcontract home health care services to nursing companies, registries, or groups (nursing groups), which would, in turn, bill the certified home health agency.That certified home health agency would then bill Medicare for all services provided to the patient by the subcontractor.The HHA's professional supervision over arranged-for services required the same quality controls and supervision of its own employees.

13. For insulin-dependant diabetic beneficiaries, Medicare paid for insulin injections by an HHA agency when a beneficiary was determined to be unable to inject his or her own insulin and the beneficiary had no available caregiver able and willing to inject the beneficiary. Additionally, for beneficiaries for whom occupational or physical therapy was medically necessary, Medicare paid for such therapy provided by an HHA. The basic requirements that a physician certify that a beneficiary is confined to the home or homebound and in need of home health services was a continuing requirement for Medicare to pay for such home health benefits.

14. While payment for each episode of care was adjusted to reflect the beneficiary's health condition and needs, Medicare regulations contained an "outlier" provision to ensure appropriate payment for those beneficiaries that had the most extensive care needs, which may result in an Outlier Payment to the HHA. These Outlier Payments were additions or adjustments to the payment amount based on an increased type or amount of medically necessary care. Adjusting payments through Outlier Payments to reflect the HHA's cost in caring for each beneficiary, including the sickest beneficiaries, ensured that all beneficiaries had access to home health services for which they were eligible.

Record Keeping Requirements

15. Medicare Part A regulations required HHAs providing services to Medicare patients to maintain complete and accurate medical records reflecting the medical assessment and diagnoses of their patients, as well as records documenting actual treatment of the patients to whom services were provided and for whom claims for

reimbursement were submitted by the HHAs. These medical records were required to be sufficient to permit Medicare, through Palmetto and other contractors, to review the appropriateness of Medicare payments made to the HHA under the Part A program.

16. Among the written records required to document the appropriateness of home health care claims submitted under Part A of Medicare was a POC that included the physician order for home health care, diagnoses, types of services/frequency of visits, prognosis/rehabilitation potential, functional limitations/activities permitted, medications/treatments/ nutritional requirements, safety measures/discharge plans, goals, and the physician's signature. Also required was a signed certification statement by an attending physician certifying that the patient was confined to his or her home and was in need of the planned home health services, and an OASIS.

17. Medicare Part A regulations required provider HHAs to maintain medical records of every visit made by a nurse, therapist, and home health aide to a beneficiary. The record of a nurse's visit was required to describe, among other things, any significant observed signs or symptoms, any treatment and drugs administered, any reactions by the patient, any teaching and the understanding of the patient, and any changes in the patient's physical or emotional condition. The home health nurse, therapist and aide were required to document the hands-on personal care provided to the beneficiary as the services were deemed necessary to maintain the beneficiary's health or to facilitate treatment of the beneficiary's primary illness or injury. These written medical records were generally created and maintained in

the form of "clinical notes" and "home health aide notes/observations." Medicare regulations require that home health agencies maintain medical records for at least seven years.

DEFENDANTS' FRAUD SCHEME

18. Defendant Sila Luis, a resident of Miami-Dade County, Florida, was president of LTC. Sila Luis was also an owner and operator of LTC and Professional Home Care.

19. Defendant Elsa Ruiz, a resident of Miami-Dade County, Florida, was an office administrator at LTC and an owner of Professional Home Care.

20. Defendant Myriam Acevedo, a resident of Miami-Dade County, Florida, was an office administrator at LTC.

21. LTC was a Florida corporation that did business in Miami-Dade County, Florida as an HHA that purported to provide home health care and physical therapy services to eligible Medicare beneficiaries.

22. In 2003, Luis was listed as the president, administrator, owner, registered agent, director, officer and managing employee in LTC's Medicare Application and Articles of Incorporation. In April 2006, LTC obtained Medicare provider number 10-8042, authorizing LTC to submit claims to Medicare for home health-related benefits and services. Luis and Acevedo had signatory authority on the LTC corporate bank accounts.

23. Professional Home Care was a Florida corporation that did business in Miami-Dade County, Florida as an HHA that purported to provide home health care and

physical therapy services to eligible Medicare beneficiaries.

24. In October 2007, Professional Home Care obtained Medicare provider number 10-8475, authorizing Professional Home Care to submit claims to Medicare for home health-related benefits and services. Since approximately September 2008, Ruiz has been listed as the administrator, director, owner, and vice president on the Medicare application and Articles of Incorporation for Professional Home Care. Ruiz had signatory authority on Professional Home Care's bank accounts.

Cooperating Witnesses

25. Cooperating witnesses will provide the following information regarding LTC and Professional Home Care, Luis, Ruiz, and Acevedo, including the following individuals (the "Cooperating Witnesses"):

a. CW1 worked as a nurse for LTC and Professional Home Care from in or about 2007 through in or about 2009;

b. CW2 worked as a nurse and patient recruiter for LTC and Professional Home Care from in or about 2006 through in or about 2009;

c. CW3 worked as a nurse for LTC and as a nurse and patient recruiter for Professional Home Care from in or about 2006 through in or about 2009;

d. CW4 worked as a patient recruiter for LTC and Professional Home Care;

e. CW5 was the owner and operator of a medical clinic that purported to provide prescriptions and POCs for home health care services to Medicare beneficiaries.

f. CW6 worked at LTC as a nurse from approximately 2009 through 2010, and as a patient recruiter for Professional Home Care;

g. CW7 worked as a patient recruiter for LTC and Professional Home Care;

h. CW8 worked as a patient recruiter for Professional Home Care.

Details of the Fraudulent Scheme at LTC and Professional Home Care

26. From January 2006 through July 2009, LTC billed the Medicare program approximately $63 million for home health services for approximately 1495 beneficiaries, and it was paid more than $38 million. Of this $63 million, approximately $56 million represented billings to Medicare for diabetic skilled nursing care and/or physical therapy.

27. From November 2007 through June 2012, Professional Home Care billed the Medicare program approximately $11 million for home health services for approximately 408 beneficiaries, and it was paid more than $7 million. Of this $11 million, approximately $10.5 million represented billings to Medicare for diabetic skilled nursing care and/or physical therapy.

28. According to the Cooperating Witnesses, LTC and Professional Home Care paid kickbacks and bribes to nurses and patient recruiters so that they would place patients with LTC and Professional Home Care. LTC and Professional Home Care would then fraudulently bill Medicare for home health services that were not medically necessary or were never provided. Cooperating Witnesses have explained that LTC and Professional Home Care

billed primarily for diabetic skilled nursing care and/or physical therapy for the recruited beneficiaries.

29. Patient recruiters would, in turn, pay the Medicare beneficiaries kickbacks for agreeing to be placed at LTC and Professional Home Care. According to the Cooperating Witnesses, recruited beneficiaries accepted these kickbacks in return for allowing LTC and Professional Home Care to fraudulently bill the Medicare program for home health services that were not medically necessary and/or not provided. I have confirmed in the Medicare claims data that LTC and/or Professional Home Care did, in fact, submit claims for the majority of beneficiaries identified by the Cooperating Witnesses.

30. Several Cooperating Witnesses stated that it was common knowledge that Luis owned and operated both LTC and Professional Home Care, and the patients were often interchanged between both companies. Luis and Ruiz were observed by various Cooperating Witnesses giving instructions to employees at LTC and Professional Home Care.

31. According to various Cooperating Witnesses, employees at LTC and Professional Home Care caused patient files to be falsified in order to make it appear that Medicare beneficiaries qualified for and received home health services that in reality were not medically necessary and/or not provided.

32. The information gathered during this investigation, including the information provided by the Cooperating Witnesses, which is detailed further below, indicates that virtually all of LTC's and Professional Home Care's billings to Medicare during the relevant time periods were

fraudulent, in that they were tainted by unlawful kickbacks, not medically necessary, and/or never provided.

CW1 – Nurse

33. CW1 worked as a nurse for LTC and Professional Home Care from in or about 2007 through in or about 2009.

34. CW1 explained to law enforcement that he/she was hired to provide skilled nursing services. But, soon after starting work, CW1 learned that the patients at LTC and Professional Home Care were being paid and did not qualify for the home health services being billed to the Medicare program. CW1 stated that LTC and Professional Home Care sought out purportedly diabetic beneficiaries because of the ability to fraudulently bill the Medicare program for skilled nursing visits two or three times per day per beneficiary, which in some cases resulted in fraudulent Medicare billings and payments exceeding $14,000 per 60-day period for each beneficiary.

35. CW1 stated that his/her nursing notes indicated that he/she visited the patients two or three times a day, but, in reality, CW1 almost never visited the patients or provided services. CW1 would have the patients sign visit logs for visits that were never provided.

CW2 – Patient Recruiter/Nurse

36. CW2 worked as a nurse and patient recruiter for LTC and Professional Home Care from in or about 2006 through in or about 2009.

37. CW2 explained to law enforcement that he/she was hired to provide skilled nursing services. But, soon after starting work, CW2 learned that the patients at LTC and Professional Home Care were being paid and did not

qualify for the home health services being billed to the Medicare program. CW2 stated that LTC and Professional Home Care sought out purportedly diabetic beneficiaries because of the ability to fraudulently bill the Medicare program for skilled nursing visits two or three times per day per beneficiary, which in some cases resulted in fraudulent Medicare billings and payments exceeding $14,000 per 60-day period for each beneficiary.

38. CW2 stated that his/her nursing notes indicated that he/she visited the patients two or three times a day, but, in reality, he/she almost never visited the patients or provided services. CW2 would have the patients sign visit logs for visits that were never provided.

39. CW2 stated he/she worked with an employee from LTC's quality control department to prepare the notes. CW2 explained that he/she paid this employee $2 per patient note which the LTC employee completed on CW2's behalf. CW2 would provide the LTC employee with weekly blood sugar logs and the LTC employee would complete the notes and add symptoms. CW2 stated that the LTC employee falsified these nursing notes to match the symptoms on the patient's POCs. CW2 stated that this was done by the LTC employee so that the services appeared legitimate, even though the symptoms did not exist. CW2 explained that he/she had the notes completed in the same manner at Professional Home Care.

40. CW2 explained that eventually he/she began recruiting patients for LTC and Professional Home Care. CW2 was paid a kickback of approximately $1300 per patient per month for each patient prescribed skilled nursing visits. CW2 was paid a kickback of approximately $600 per cycle for each patient prescribed physical

therapy. CW2 was paid kickbacks for each patient he/she recruited for LTC by Acevedo and for Professional Home Care by Ruiz.

CW3 – Patient Recruiter/Nurse

41. CW3 worked as a nurse and patient recruiter for LTC and Professional Home Care from in or about 2006 through in or about 2009.

42. CW3 explained to law enforcement that he/she was hired to provide skilled nursing services. But, soon after starting work, CW3 learned that the patients at LTC and Professional Home Care were being paid and did not qualify for the home health services being billed to the Medicare program. CW3 stated that LTC and Professional Home Care sought out purportedly diabetic beneficiaries because of the ability to fraudulently bill the Medicare program for skilled nursing visits two or three times per day per beneficiary, which in some cases resulted in fraudulent Medicare billings and payments exceeding $14,000 per 60-day period for each beneficiary.

43. CW3 stated that his/her nursing notes indicated that he/she visited the patients two or three times a day, but, in reality, he/she almost never visited the patients or provided services. CW3 would have the patients sign visit logs for visits that were never provided.

44. CW3 also worked as the Director of Nursing ("DON") at Professional Home Care from May to October 2007, and then from April 2008 through July 2009. CW3 referred patients to Professional Home Care in exchange for $800 per patient per month ($400 of that kickback was to be paid to the patients). CW3 agreed with Ruiz that he/she would receive $1200 per month for patients that

received both skilled nursing and physical therapy services ($700 of that kickback was to be paid to the patients).

CW4 – Patient Recruiter

45. CW4 worked as a patient recruiter for LTC and Professional Home Care. CW4 met directly with Luis, who agreed she would pay CW4 $1600 per patient per cycle for patients prescribed physical therapy and $1500 per patient per month for patients prescribed skilled nursing services. Bank records reflect that LTC paid CW4 $130,000 between October 2007 and July 2009.

46. CW4 and Luis agreed to similar rates for patient referrals to Professional Home Care. Bank records reflect that Professional Home Care has paid CW4 $56,000.

47. CW4 has stated that the patients he/she recruited for LTC and Professional Home Care did not qualify for either skilled nursing care or physical therapy, and that he/she provided false home health aide certificates. In fact, CW4 never provided any home health aide services, but believes Luis asked for this documentation to make it appear that the recruiting kickback checks were legitimate payments for home health aide services.

CW5 – Owner of Medical Clinic

48. CW5 was the owner and operator of a medical clinic that purported to provide prescriptions and POCs for home health care services to Medicare beneficiaries.

49. CW5 met with Luis, who offered to pay CW5 for patient referrals in the amount of $1400 per patient, per cycle for patients prescribed physical therapy and $1500 per patient, per month for patients prescribed skilled nursing services. CW5 declined this offer.

50. CW5 received a call in 2008 from Luis, who requested that doctors employed by the clinic sign false POCs for Luis in exchange for $500 per POC. CW5 declined this offer.

51. A patient recruiter for LTC also brought patients to the clinic in order to receive prescriptions and POCs for these patients. The recruiter explained that LTC paid him kickbacks for each patient he recruited for LTC; these patients did not qualify for the prescribed medical services.

CW6 – Nurse/Patient Recruiter

52. CW6 worked as a nurse at LTC from approximately 2009 through 2010. CW6 was employed purportedly to provide nursing services at LTC to approximately 15-17 patients. However, these patients did not qualify for skilled nursing home health visits, and many were not even diabetic. CW6 stated that he/she visited the patients at LTC approximately 2 to 3 times per week, instead of the 14 times he/she indicated in LTC's records. Instead of providing skilled nursing care, CW6 visited the patients only in order to have the patients sign visit logs for days that CW6 was not there.

53. CW6 stated that he/she subsequently began recruiting his/her own patients and approached Acevedo at LTC and discussed recruiting patients for LTC in exchange for kickbacks. Acevedo told CW6 that LTC in general had grown too large and the amount of patients at LTC looked suspicious. Acevedo explained, however, that she had another home health agency where CW6 could bring his/her recruited patients. Acevedo told CW6 to bring his/her patients to Professional Home Care, and directed CW6 to meet with one of the owners of

Professional Home Care (as listed in its Articles of Incorporation).

54. CW6 met with the owner, who agreed to pay CW6 approximately $1300 per patient per month for patients prescribed skilled nursing services. The owner also agreed to pay CW6 approximately $1000 per patient per physical therapy cycle.

55. CW6 recruited approximately 5-7 patients for Professional Home Care and also worked there as a nurse. CW6 has admitted that the patients he/she recruited at Professional Home Care did not qualify for the services being billed to Medicare, and many were not even diabetic.

56. False documentation for CW6's recruited patients, including home health prescriptions and signed POCs, were received from a particular doctor. CW6 explained that he/she paid the doctor's office administrator cash kickbacks of $200 per POC in exchange for the doctor's signature. This doctor was previously indicted in the District Court for the Southern District of Florida (Case no. 11-CR-20113) for his role in other home health frauds, and subsequently pled guilty for prescribing home health services that were not medically necessary.

CW7 – Patient Recruiter

57. CW7 stated that he/she recruited Medicare beneficiaries and paid them kickbacks to participate in the fraudulent schemes at LTC and Professional Home Care. CW7 agreed with another patient recruiter for LTC to transfer CW7's patients from another home health care agency to LTC in exchange for $1200 per month per patient if the patient was prescribed skilled nursing and $1000 if the patient was prescribed physical therapy. Those

rates were later increased to $1500 per patient after CW7 threatened to leave LTC and transfer his/her patients to another home health agency.

58. CW7 stated that when he/she moved over to LTC, he/she was joined by CW1, who was assigned to act as the nurse for CW7's patients because CW1 was aware that the patients did not in fact need the skilled nursing services that had been prescribed for them. CW7 met directly with his/her patients and agreed to pay them kickbacks.

59. CW7 also recruited a patient for Professional Home Care, for whom he/she was paid $1200 per month.

CW8 – Patient Recruiter

60. CW8 acted as a patient recruiter for Professional Home Care. CW8 recruited a patient and agreed with Ruiz to receive in exchange approximately $1200 per month for the prescribed skilled nursing services and another approximately $800 per cycle for the physical therapy services. CW8 was aware that the patient did not require the medical services that were prescribed for him.

DISSIPATION OF ASSETS

61. Both LTC and Professional Home Care completed multiple Authorization Agreements for Electronic Funds Transfer, by which they agreed to accept Medicare payments via direct deposit into their bank accounts at SunTrust Bank, Bank Atlantic, and International Finance Bank. For LTC, the Electronic Funds Transfer Agreements ("EFTs") were signed by Sila Luis, and Myriam Acevedo was listed as the contact person. For Professional Home Care, the EFTs were signed by Sila Luis's husband at the time, and Elsa Ruiz was listed as the contact person.

62. From January 2006 through July 2009, Medicare deposited approximately **$38 million** into LTC's corporate bank accounts, either through checks or electronic funds transfers.

63. From November 2007 through June 2012, Medicare deposited approximately **$7 million** into Professional Home Care's corporate bank accounts, either through checks or electronic funds transfers.

64. These deposits by Medicare to LTC and Professional Home Care were in payment for the fraudulent claims submitted by LTC and Professional Home Care.

65. Defendants implemented schemes to transfer these Medicare monies to themselves both directly and by using shell companies. Evidence gathered during the government's investigation indicates that Defendant Luis had family members open shell companies, and that Luis would transfer monies to these companies. In addition, a recruiter for LTC opened a shell company that would receive checks directly from LTC, money which the recruiter would then use to pay kickbacks to beneficiaries.

66. Defendants also withdrew substantial amounts of cash from LTC's and Professional Home Care's corporate accounts in order to pay kickbacks in furtherance of their fraudulent schemes.

67. Defendants also used Medicare monies for foreign travel, to pay substantial salaries to themselves, to purchase multiple properties, and to purchase luxury cars.

68. For example, of the monies paid by Medicare, Defendant Sila Luis received approximately $4.49 million; Myriam Acevedo received approximately $1.52 million

(with almost another million going to a company she owned); and Elsa Ruiz received close to $900,000 (she appears to have received more indirectly). As another example, approximately $225,000 of Medicare monies went to Mercedes Benz for luxury automobiles.

69. From at least January 2006 to the present, Defendants have systematically dissipated the vast majority of the funds received from Medicare by writing checks and making transfers from LTC's and Professional Home Care's bank accounts to themselves, other entities they control, and to third parties to pay for kickbacks, real estate and personal luxury items.

70. Although Medicare has paid Defendants, through LTC and Professional Home Care, $45 million since January 2006, the United States has only been able to locate assets totaling a fraction of that amount. Defendants appear to have dissipated tens of millions of dollars in Medicare funds, and unless enjoined will continue to dissipate the proceeds of their Medicare fraud.

71. I have located the following properties owned by Defendants:

Owner	Address	Assessed Value
Sila Gutierrez[1] [fn1: Gutierrez is Defendant Sila Luis's maiden name.]	600 NW 32nd Pl., #207, Miami, FL 33125	$41,990
Sila Luis	600 NW 32nd Pl., # 413, Miami, FL 33125	$39,690
Sila Luis	3401 SW 11th St., 1-B, Miami, FL 33135	$61,190

Sila Gutierrez & Wilfredo Luis	4779 Collins Ave., #2007, Miami Beach, FL 33140	$520,610
Sila Gutierrez & Wilfredo Luis	6055 SW 87th Ave., Miami, FL 33173	$754,624
Sila Luis & Wilfredo Luis	16171 SW 151 Terrace, Miami, FL 33196	$205,870
Sila Luis & Wilfredo Luis	6940 SW 90th St., Miami, FL 33156	$1,208,608
LS Property Holdings, LLC (owned by Sila Luis)	3401 SW 11th St., 2A, Miami, FL 33135	$61,190
LS Property Holdings, LLC (owned by Sila Luis)	1250 West Ave, Apt. 4G, Miami Beach, FL 33139	$72,050
LS Property Holdings, LLC (owned by Sila Luis)	7400 SW 48th St., Miami, FL 33155	$274,010
LS Property Holdings, LLC (owned by Sila Luis)	7174 SW 47th St., #7174, Miami, FL 33155	$214,080
LS Property Holdings, LLC (owned by Sila Luis)	1250 West Ave., Apt. 4D, Miami Beach, FL 33139	$74,510
Myriam Acevedo	3261 SW 140 Avenue, Miami, FL 33175	$210,212

Myriam Acevedo	13458 SW 62 St., #110-Q, Miami, FL 33183	$65,240
Myriam Acevedo	10700 NW 66 St., #206, Miami, FL 33178	$179,982
Myriam Acevedo	2299 SW 27th Ave., Miami, FL 33145 (unit numbers unknown)	$709,396

72. I have located the following accounts owned by Defendants, individually or through LTC or Professional Home Care:

Bank Name	**Account Holder**	**Account Number Ending In**
SunTrust	LTC	x5786
SunTrust	LTC	x0769
Wells Fargo	LTC	x4160
Wachovia	LTC	x8976
SunTrust	LTC	x0536
SunTrust	LTC	x4361
SunTrust	LTC	x0769
SunTrust	LTC	x1740
Bank Atlantic	LTC	x3921
Bank Atlantic	LTC	x6860
Regions Bank	Sila Luis/Wilfredo Luis	x7541
Regions Bank	Sila Luis/Wilfredo Luis	x8199
Regions Bank	Sila Luis/Wilfredo Luis	x8326
Bank of America	Sila Luis	x1826
Bank of America	Sila Luis	x4829

Bank of America	Sila Luis	x4887
Bank of America	Sila Luis	x8884
Bank of America	Sila Luis	x8897
HSBC	Sila Luis	x0408
Bank Atlantic	Sila Luis/Kyusttin A. Abreu	x6251
Bank of America	Sila Luis	x8884
SunTrust	Sila Luis	x0627
SunTrust	Sila Luis	x1348
SunTrust	Sila Luis	x5426
SunTrust	Sila Luis	x0623
Eastern National Finance	Sila Luis	x7406
Eastern National Finance	Sila Luis	x2402
WAMU	Sila Luis	x8534
Bank of America	Sila Luis	x4882
Regions Bank	Sila Luis	x7134
SunTrust	Elsa Ruiz	x5854
Bank of America	Elsa Ruiz	x4805
International Finance	Professional Home Care	x3458
SunTrust	Professional Home Care	x4477
Wachovia	Myriam Acevedo	x1736
Power Financial CU	Myriam Acevedo	x11-31
Regions Bank	Myriam Acevedo	x3568
Regions Bank	Myriam Acevedo	x9652
SunTrust	Myriam Acevedo	x1744
Eagle National Bank	Myriam Acevedo	x1803

CONCLUSION

73. Based upon my experience and training, as well as the information described in this Declaration and otherwise learned in this investigation, I believe that the claims submitted to Medicare by LTC from January 2006 through July 2009, and by Professional Home Care from November 2007 through June 2012, were false and/or fraudulent claims, in that Defendants conspired to submit and submitted false claims to the Medicare program that were tainted by illegal kickback payments; and conspired to submit claims for home health services that were not medically unnecessary and/or not provided. Defendants' conduct has resulted in the Defendants obtaining money of a health care benefit program through the means of a scheme and artifice to defraud, in the sum of approximately **$45 million**.

FURTHER DECLARANT SAYETH NAUGHT.

Pursuant to Title 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and is based upon my personal knowledge this *2nd* day of October, 2012, in Miami, FL.

/s Clint E. Warren
CLINT E. WARREN
SPECIAL AGENT
FEDERAL BUREAU OF INVESTIGATION

filed by
/s *Susan Torres*
Susan Torres
AUSA

Case 1:12-cv-23588-PCH Document 11

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-23588-CIV-HUCK/BANDSTRA

UNITED STATES OF AMERICA

Plaintiff,

v.

FILED UNDER SEAL
(Filed Oct. 3, 2012)

SILA LUIS, ELSA RUIZ, and MYRIAM ACEVEDO,

Defendants.

_____/

TEMPORARY RESTRAINING ORDER

On this *3rd* day of October 2012, at *9:20 a.m.*, upon consideration of Plaintiff United States of America's Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law, pursuant to 18 U.S.C. § 1345, the Complaint filed by Plaintiff United States of America, and the Declaration of Clint E. Warren, the Court finds that the United States has demonstrated that:

1. the Defendants Sila Luis, Elsa Ruiz, and Myriam Acevedo are violating and unless enjoined will continue to violate 18 U.S.C. § 1349, 18 U.S.C. § 371, and/or 42 U.S.C. § 1320a-7b and have committed and unless enjoined would continue to commit a Federal health care offense through

the submission of false and fraudulent claims to the Medicare program;

2. the Defendants are alienating or disposing of property, and intend to alienate or dispose of property, obtained as a result of a Federal health care offense, property which is traceable to such violation, or property of equivalent value; and

3. the provision of advance notice to the Defendants will likely aggravate the damage that the order seeks to prevent because advance notice will provide the Defendants with the opportunity to transfer, expend, or conceal the remaining property.

Based on the foregoing, the Court hereby concludes as follows:

4. that the requested relief be considered and GRANTED without prior notice to the Defendants; and

5. because the United States' motion is based upon 18 U.S.C. § 1345, which expressly authorizes injunctive relief to protect the public interest, no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a temporary restraining order in this case.

After consideration of the foregoing, it is therefore

ORDERED, ADJUDGED, and DECREED that the Defendants, their respective owners, agents, employees, attorneys, and all persons acting in concert and participation with them, including all banking and other financial institutions at which they do business, and all corporations over which they exercise control, who receive

actual or constructive notice by personal service, by publication, or otherwise, be enjoined as follows:

1. From making or submitting or conspiring to make or submit any claims to the Medicare program or any health care benefit program, as defined in 18 U.S.C. § 24(b), in violation of 18 U.S.C. § 1349, 18 U.S.C. § 371, and/or 42 U.S.C. § 1320a-7b, and from committing any Federal health care offense, as defined in 18 U.S.C. § 24;

2. From alienating, withdrawing, transferring, removing, dissipating, or otherwise disposing of, in any manner, any moneys or sums presently deposited, or held on behalf of any Defendant by any financial institution, trust fund, or other financial entity, public or private, that are proceeds or profits from Defendants' Federal health care offenses or property of an equivalent value of such proceeds or profits, **including but not limited to** the following accounts:

Bank Name	Account Holder	Account Number Ending In
SunTrust	LTC	x5786
SunTrust	LTC	x0769
Wells Fargo	LTC	x4160
Wachovia	LTC	x8976
SunTrust	LTC	x0536
SunTrust	LTC	x4361
SunTrust	LTC	x0769
SunTrust	LTC	x1740
Bank Atlantic	LTC	x3921
Bank Atlantic	LTC	x6860
Regions Bank	Sila Luis/Wilfredo Luis	x7541

Regions Bank	Sila Luis/Wilfredo Luis	x8199
Regions Bank	Sila Luis/Wilfredo Luis	x8326
Bank of America	Sila Luis	x1826
Bank of America	Sila Luis	x4829
Bank of America	Sila Luis	x4887
Bank of America	Sila Luis	x8884
Bank of America	Sila Luis	x8897
HSBC	Sila Luis	x0408
Bank Atlantic	Sila Luis/Kyusttin A. Abreu	x6251
Bank of America	Sila Luis	x8884
SunTrust	Sila Luis	x0627
SunTrust	Sila Luis	x1348
SunTrust	Sila Luis	x5426
SunTrust	Sila Luis	x0623
Eastern National Finance	Sila Luis	x7406
Eastern National Finance	Sila Luis	x2402
WAMU	Sila Luis	x8534
Bank of America	Sila Luis	x4882
Regions Bank	Sila Luis	x7134
SunTrust	Elsa Ruiz	x5854
Bank of America	Elsa Ruiz	x4805
International Finance	Professional Home Care	x3458
SunTrust	Professional Home Care	x4477
Wachovia	Myriam Acevedo	x1736
Power Financial CU	Myriam Acevedo	x11-31
Regions Bank	Myriam Acevedo	x3568
Regions Bank	Myriam Acevedo	x9652

SunTrust	Myriam Acevedo	x1744
Eagle National Bank	Myriam Acevedo	x1803

3. From alienating, withdrawing, transferring, removing, dissipating, or otherwise disposing of, in any manner, assets, real or personal (including, for example, real estate, motor vehicles, boats and watercraft, jewelry, artwork, antiques, household furniture and furnishings, etc.), in which any Defendant has an interest, up to the equivalent value of the proceeds of the Federal health care fraud, **including but not limited to** the following properties:

Owner	Address	Assessed Value
Sila Gutierrez	600 NW 32nd Pl., #207, Miami, FL 33125	$41,990
Sila Luis	600 NW 32nd Pl., # 413, Miami, FL 33125	$39,690
Sila Luis	3401 SW 11th St., 1-B, Miami, FL 33135	$61,190
Sila Gutierrez & Wilfredo Luis	4779 Collins Ave., #2007, Miami Beach, FL 33140	$520,610
Sila Gutierrez & Wilfredo Luis	6055 SW 87th Ave., Miami, FL 33173	$754,624
Sila Luis & Wilfredo Luis	16171 SW 151 Terrace, Miami, FL 33196	$205,870

Sila Luis & Wilfredo Luis	6940 SW 90th St., Miami, FL 33156	$1,208,608
JS Property Holdings, LLC (owned by Sila Luis)	3401 SW 11th St., 2A, Miami, FL 33135	$61,190
JS Property Holdings, LLC (owned by Sila Luis)	1250 West Ave, Apt. 4G, Miami Beach, FL 33139	$72,050
JS Property Holdings, LLC (owned by Sila Luis)	7400 SW 48th St., Miami, FL 33155	$274,010
JS Property Holdings, LLC (owned by Sila Luis)	7174 SW 47th St., #7174, Miami, FL 33155	$214,080
JS Property Holdings, LLC (owned by Sila Luis)	1250 West Ave., Apt. 4D, Miami Beach, FL 33139	$74,510
Myriam Acevedo	3261 SW 140 Avenue, Miami, FL 33175	$210,212
Myriam Acevedo	13458 SW 62 St., #110-Q, Miami, FL 33183	$65,240
Myriam Acevedo	10700 NW 66 St., #206, Miami, FL 33178	$179,982
Myriam Acevedo	2299 SW 27th Ave., Miami, FL 33145	$709,396

IT IS FURTHER ORDERED that Defendants, their respective owners, agents, employees, attorneys, and all

persons acting in concert and participation with them, including all banking and other financial institutions at which they do business, and all corporations over which they exercise control, are ordered:

4. To preserve all business, financial and accounting records, including bank records, that detail any of Defendants' business operations and disposition of any payment that directly or indirectly arose from the payment of money to any Defendant on behalf of the Medicare program;

5. To preserve all medical records, including patient records, that relate to any Defendants' business operations and/or to services for which claims were submitted to the Medicare program;

IT IS FURTHER ORDERED that Defendants, within one calendar week of receiving notice of this Order:

6. Provide to the United States the following:

a. a list of all post office boxes or other locations at which mail addressed to each Defendant is received by or on behalf of each Defendant;

b. a list of all financial institutions, including but not limited to banks and brokerage houses, at which there are now, or have been maintained in the past three years, any savings, checking, money market, investment, retirement, or any other kind of account or other safe deposit box into which money has been deposited in any Defendant's name or in the names of any of their owners, agents, employees, officers, persons acting in concert with them, or any business names under which they operate, together with

the number or other designation of each such account or box;

c. a list of all financial institutions, including but not limited to, banks and brokerage houses, at which there are now, or have been maintained in the past three years, any savings, checking, money market, investment, retirement, or any other kind of account or other safe deposit box into which monies received in response to any of the activities described in the United States' complaint, have been deposited, together with the number of such box or other designation of each such account or box; and

d. the names, addresses, and telephone numbers of any individuals who have received remuneration of any kind for assisting in record-keeping, bookkeeping, accounting, brokering, or financial, investment, or tax advice or consultation for any Defendant in the past three years;

7. Complete a Financial Disclosure Statement form provided by the United States and, on a monthly basis, provide an accounting of their assets in suitable reports detailing their financial conditions.

IT IS FURTHER ORDERED that the United States shall promptly attempt to provide notice of this action and this Order to Defendants by, to the extent necessary, attempting service at last known addresses and by attempting telephone notice via known telephone numbers. Pursuant to 18 U.S.C. § 1345(a)(3) and Rule 65(c) of the Federal Rules of Civil Procedure, Plaintiff United States of America shall not be required to post security for the instant action.

This temporary restraining order shall remain in force until the close of business on the *13th* day of *October*, 2012, or at such later date as may be extended by the Court, or agreed upon by the parties.

The parties shall take notice that this matter shall come before the Court for a preliminary injunction hearing on the *12th* day of *October*, 2012, at *4:00 p.m.*, in accordance with Plaintiff's complaint and motion for injunctive relief. Defendants may request an earlier hearing on the terms of this temporary restraining order in accordance with the terms of Federal Rule of Civil Procedure 65. *The hearing will be held in Courtroom 12-2, 400 N. Miami Avenue, Miami, FL before U.S. District Court Judge Cecila Altogna* [sic].

DONE AND ORDERED at Miami, Florida, this *3rd* day of *October*, 2012.

/s Paul Huck
UNITED STATES DISTRICT JUDGE

cc: Susan Torres, AUSA

Case 1:12-cv-23588-PCH Document 30

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 12-23588-CIV-HUCK/BANDSTRA

UNITED STATES OF AMERICA

Plaintiff,

v.

SILA LUIS, ELSA RUIZ, and
MYRIAM ACEVEDO,

Defendants.

_____/

ORDER GRANTING MOTION TO MODIFY
TEMPORARY RESTRAINING ORDER
(Filed Nov. 5, 2012)

After consideration of Plaintiff United States of America's Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law, pursuant to 18 U.S.C. § 1345, the Complaint filed by Plaintiff United States of America, and the Declaration of Clint E. Warren, the Court previously entered a Temporary Restraining Order on October 3, 2012 (the "TRO") [DE #11], and extended it by Order dated October 12, 2012 [DE #18]. The United States has now filed an Unopposed Motion to Modify Temporary Restraining Order to correct the listing of Defendants' assets, specifically their bank accounts and real properties. Upon consideration of the Motion and the record in this case, it is hereby

ORDERED and ADJUDGED that the Motion is **GRANTED**. The TRO previously entered by the Court is modified to reflect the following listing of Defendants' bank accounts:

Bank Name	Account Holder	Account Ending In	Amount
Wells Fargo	LTC	x4160	$60,078.97
Bank Atlantic/BB&T	LTC	x3921	$4,143.89
Bank Atlantic/BB&T	LTC	x6860	$2,099.44
Regions Bank	Sila Luis	x7541	$194,338.83
Bank of America	Sila Luis & Wilfredo Luis	x4829	$22,808.87
HSBC	Sila Luis	x9332	$67.10
Bank Atlantic/BB&T	Sila Luis/Kyusttin Abreu	x6251	$2,737.39
JP Morgan Chase	Sila Luis & Wilfredo Luis	x8534	$1,654.56
JP Morgan Chase	Sila Luis & Wilfredo Luis	x7668	$3,324.11
SunTrust Investments	Sila Luis & Wilfredo Luis	x8080	$902.00

City National Bank	Briana Abreu, Sila Luis custodian	x5672	$160,555.00
City National Bank	Brian Abreu, Sila Luis custodian	x5669	$100,521.00
City National Bank	Sila Luis; Lisandra Guerrero	x5040	$22,152.00
City National Bank	LS Property Holdings, LLC	x2171	$45,735.00
Bank of America	Elsa Ruiz	x4805	$44,747.26
Bank of America	FL UTMA account for Madison I. Perez, Elsa T. Perez custodian	x6185	$2,120.90
International Finance	Professional Home Care; Wilfredo Luis	x3458	$78,248.89
International Finance	Professional Home Care; Lourdes Cazola Gutierrez, Wilfredo Luis	x4551	$35,000.00

Wells Fargo	Myriam Acevedo	x3176	$35.61
Power Financial CU	Myriam Acevedo	x2611	$838.37
Power Financial CU	Myriam Acevedo	x2191	$280.96
Regions Bank	Myriam Acevedo	x9652	$1,517.96
Eagle National Bank	Myriam Acevedo	x3715	$1,538.24

The TRO is further modified to reflect the following listing of Defendants' real properties:

Owner	Address	Assessed Value
Sila Gutierrez	600 NW 32nd Pl., #207, Miami, FL 33125	$44,090
Sila Luis	600 NW 32nd Pl., # 413, Miami, FL 33125	$41,670
Sila Luis	3401 SW 11th St., 1-B, Miami, FL 33135	$52,010
Sila Gutierrez & Wilfredo Luis	4779 Collins Ave., #2007, Miami Beach, FL 33140	$520,610
Sila Gutierrez & Wilfredo Luis	6055 SW 87th Ave., Miami, FL 33173	$698,577
Sila Luis & Wilfredo Luis	16171 SW 151 Terrace, Miami, FL 33196	$186,689

Sila Luis & Wilfredo Luis	6940 SW 90th St., Miami, FL 33156	$1,204,289
LS Property Holdings, LLC (owned by Sila Luis)	3401 SW 11th St., 2A, Miami, FL 33135	$52,010
LS Property Holdings, LLC (owned by Sila Luis)	1250 West Ave, Apt. 4G, Miami Beach, FL 33139	$79,255
LS Property Holdings, LLC (owned by Sila Luis)	7400 SW 48th St., Miami, FL 33155	$274,010
LS Property Holdings, LLC (owned by Sila Luis)	7174 SW 47th St., #7174, Miami, FL 33155	$214,080
LS Property Holdings, LLC (owned by Sila Luis)	1250 West Ave., Apt. 4D, Miami Beach, FL 33139	$81,691
LS Property Holdings, LLC (owned by Sila Luis)	2925 Indian Creek Drive, #316, Miami Beach, Florida 33140	$40,030
LS Property Holdings, LLC (owned by Sila Luis)	2925 Indian Creek Drive, #320, Miami Beach, Florida 33140	$40,030

Myriam Acevedo	3261 SW 140 Avenue, Miami, FL 33175	$210,212
Myriam Acevedo	13458 SW 62 St., #110-Q, Miami, FL 33183	$65,240
Myriam Acevedo	2299 SW 27th Ave., Miami, FL 33145	$709,396

IT IS FURTHER ORDERED that, apart from the modifications noted above, the TRO shall remain in effect in every other respect.

DONE AND ORDERED at Miami, Florida, this 5th day of November, 2012.

/s Paul C. Huck
PAUL C. HUCK
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

Case 1:12-cv-23588-PCH Document 66-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 12-23588-CIV-HUCK/BANDSTRA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SILA LUIS, ELSA RUIZ, and
MYRIAM ACEVEDO,

Defendants.

_____/

SUPPLEMENTAL DECLARATION OF SPECIAL AGENT CLINT E.WARREN IN SUPPORT OF THE UNITED STATES' MOTION FOR TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION
(Filed Dec. 27, 2012)

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI") and have been assigned in this capacity since August 2004. Since being assigned to the FBI's Miami Field Office, I have been primarily involved in the investigation of health care fraud in the South Florida area. During that time, I have investigated numerous matters relating to alleged frauds against health insurance programs, primarily, the Medicare Program, and have attended numerous health care fraud training programs. Specifically, I have investigated numerous home health agencies engaged in fraud.

2. The statements in this Supplemental Declaration are based upon information I have learned during the investigation of the Defendants and their businesses known as LTC Professional Consultants, Inc. ("LTC") and Professional Home Care Solutions, Inc. ("Professional Home Care"), including, but not limited to, information provided to me by Special Agents of the FBI and Health and Human Services-Office of Inspector General ("HHS-OIG"), public source and business records, bank records, and my experience and background as an FBI Special Agent. This Supplemental Declaration is being submitted for the purpose of supporting the temporary restraining order and preliminary injunction sought by the United States in this matter, and I have not included each and every fact known to me concerning this investigation. The investigation continues, specifically with respect to the tracing of funds received by Defendants from the Medicare program. Additional information obtained thus far in that regard is included below.

DISSIPATION OF ASSETS

3. Defendant Luis transferred monies or caused the transfer of monies received from Medicare to the following family members and companies owned by family members or by other Defendants, including:

W.L.[1] (husband) [fn1: While redaction of names is not required by Rule 5.2 of the Federal Rules of Civil Procedure, only initials of Defendant Luis's family members are included in an abundance of caution. Full names are available.]	$1,471,000

Accurate Staffing (owned by Defendant Myriam Acevedo)	$879,500
Country Walk Pharmacy & Discount (W.L. on board of directors)	$666,671
ER Medical Consultants (owned by Defendant Elsa Ruiz)	$545,030
M.A. (ex-daughter-in-law)	$541,323
L.L. (daughter)	$450,013
1st Class Home Health (owned by A.C., nephew)	$237,895
K.A. (son)	$236,586
J.G. (believed to be family member)	$149,016
L.C. (niece)	$66,036
M.B-G. (niece)	$63,932
E.A. (nephew)	$63,759
G.G. (son-in-law)	$40,390
A.R. (husband of L.C.)	$30,574
S.A. (niece)	$16,140
J.S./J.F.S. (believed to be same person) (sister)	$2,020 / $13,450

Note: Amounts are approximate as tracing analysis is still ongoing. Relationships noted are based on current information. Amounts include monies from both LTC and Professional Home Care.

4. Defendant Luis used Medicare monies for foreign travel. During the time periods at issue, she traveled to Cuba on at least 4 occasions and to Mexico, where she owns several properties and has numerous bank accounts, approximately 31 times. Luis transferred Medicare monies overseas through international wire transfers to Mexico including to her Mexican corporation Corporativo Sila.

Defendant Luis also used Medicare monies to fund brokerage accounts.

5. Numerous pieces of expensive jewelry worth in total over $250,000 were found at Defendant Luis's residence during the execution of a search warrant. Defendant Luis's counsel has informed the United States that more jewelry is in a safety deposit box at City National Bank.

6. The United States has been able to trace Medicare proceeds going into every bank account owned by Defendant Luis and/or her companies listed in the Court's Order Granting Motion to Modify Temporary Restraining Order [DE #30], except for the HSBC account ending in x9332 (containing approximately $67). Financial tracing is still ongoing.

7. The United States has been able to trace Medicare proceeds going into the purchase or maintenance of the following properties owned by Defendant Luis and/or her companies:

Owner	Address	Assessed Value
Sila Luis	600 NW 32nd Place, #413, Miami, FL 33125	$41,670
Sila Gutierrez & Wilfredo Luis	4779 Collins Avenue, #2007, Miami Beach, FL 33140	$520,610
Sila Gutierrez & Wilfredo Luis	6055 SW 87th Avenue, Miami, FL 33173	$698,577

Sila Luis & Wilfredo Luis	6940 SW 90th St., Miami, FL 33156	$1,204,289
LS Property Holdings, LLC (owned by Sila Luis)	7174 SW 47th St., #7174, Miami, FL 33155	$214,080
LS Property Holdings, LLC (owned by Sila Luis)	2925 Indian Creek Drive, #316, Miami Beach, FL 33140	$40,030
LS Property Holdings, LLC (owned by Sila Luis)	2925 Indian Creek Drive, #320, Miami Beach, FL 33140	$40,030

These are all but two of the properties owned by Defendant Luis believed to currently have positive equity. Financial tracing is still ongoing.

FURTHER DECLARANT SAYETH NAUGHT.

Pursuant to Title 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and is based upon my personal knowledge this *27th* day of December, 2012, in Miami, FL.

/s Clint E. Warren
CLINT E. WARREN
SPECIAL AGENT
FEDERAL BUREAU OF INVESTIGATION

Case 1:12-CV-23588-PCH Document 96-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 12-23588-CIV-HUCK/O'SULLIVAN

UNITED STATES OF AMERICA,

Plaintiff,

v.

SILA LUIS, ELSA RUIZ, and
MYRIAM ACEVEDO,

Defendants.

_____/

SECOND SUPPLEMENTAL DECLARATION OF SPECIAL AGENT CLINT E.WARREN IN SUPPORT OF THE UNITED STATES' MOTION FOR TEMPORARY RESTRAINING ORDER & PRELIMINARY INJUNCTION

(Filed Feb. 1, 2013)

1. I am a Special Agent with the Federal Bureau of Investigation ("FBI") and have been assigned in this capacity since August 2004. Since being assigned to the FBI's Miami Field Office, I have been primarily involved in the investigation of health care fraud in the South Florida area. During that time, I have investigated numerous matters relating to alleged frauds against health insurance programs, primarily, the Medicare Program, and have attended numerous health care fraud training programs. Specifically, I have investigated numerous home health agencies engaged in fraud.

2. The statements in this Second Supplemental Declaration are based upon information I have learned during the investigation of the Defendants and their businesses known as LTC Professional Consultants, Inc. ("LTC") and Professional Home Care Solutions, Inc. ("Professional Home Care"), including, but not limited to, information provided to me by Special Agents of the FBI and Health and Human Services-Office of Inspector General ("HHS-OIG"), public source and business records, bank records, and my experience and background as an FBI Special Agent. This Second Supplemental Declaration is being submitted for the purpose of supporting the temporary restraining order and preliminary injunction sought by the United States in this matter, and I have not included each and every fact known to me concerning this investigation. The investigation concerning Defendants and their companies continues.

Patients Identified by Cooperating Witnesses

3. My initial Declaration in this matter identified eight cooperating witnesses ("CW"s) who have provided information regarding Defendants and their companies. These CWs have identified individual beneficiaries who were paid kickbacks in exchange for allowing LTC and/or Professional Home Care to bill Medicare for home health care services on their behalf. These beneficiaries identified by the CWs are not necessarily the only ones the CWs know of who were paid kickbacks, but rather those who the CWs can specifically identify at this time.

4. CW1 identified 2 patients.[1] [fn.1: The patient names have not been included because doing so would likely reveal the identity of the witness. Patient names are available, however, if the Court wishes to review them *in camera*.] The total paid by Medicare to LTC and/or

Professional Home Care Solutions for claims submitted on behalf of these patients is $71,313.40.

5. CW2 identified 19 patients. The total paid by Medicare to LTC and/or Professional Home Care Solutions for claims submitted on behalf of these patients is $1,168,805.96.

6. CW3 identified 2 patients. The total paid by Medicare to LTC and/or Professional Home Care Solutions for claims submitted on behalf of these patients is $81,512.58.

7. CW4 identified 10 patients. The total paid by Medicare to LTC and/or Professional Home Care Solutions for claims submitted on behalf of these patients is $265,216.72.

8. CW5 identified 50 patients. The total paid by Medicare to LTC and/or Professional Home Care Solutions for claims submitted on behalf of these patients is $2,122,893.96.

9. CW6 identified 16 patients. The total paid by Medicare to LTC and/or Professional Home Care Solutions for claims submitted on behalf of these patients is $505,114.76.

10. CW7 identified 3 patients. The total paid by Medicare to LTC and/or Professional Home Care Solutions for claims submitted on behalf of these patients is $113,646.81.

11. CW8 identified 1 patient. The total paid by Medicare to LTC and/or Professional Home Care Solutions for claims submitted on behalf of these patients is $28,049.66.

12. The total amount paid by Medicare to LTC and/or Professional Home Care for patients identified by these eight CWs as having been paid kickbacks is $4,356,553.85.

Medicare Provider Application

13. Defendant Sila Luis signed a Medicare enrollment agreement and made certain certifications in connection therewith, including agreeing to abide by Medicare laws, regulations, and program instructions, including the federal anti-kickback statute. Copies of relevant pages, including those with her signature, are attached hereto as composite Exhibit A.

Information from Additional Cooperating Witness[2]

[fn.2: Redacted interview reports for this witness are being produced to Defendant Luis.]

14. Since the filing of this action, CW9 has provided information to the government concerning this investigation. CW9 held a prominent position at both agencies during the course of the conspiracy.

15. CW9 worked closely with Sila Luis, knew her family, and traveled with her abroad on occasion.

16. Sila Luis directed CW9 to cash checks at a particular bank and to then use the cash to pay recruiters for LTC. CW9 also stated that Sila Luis cashed checks herself, paid kickbacks to patient recruiters, and kept track of the various recruiters and the patients they recruited to LTC.

17. CW9 stated that certain family members of Sila Luis also cashed checks from LTC for the purpose of paying kickbacks.

18. CW9 stated that LTC wanted diabetic patients because Medicare reimbursed the most for them.

19. The patient recruiters for Professional Home Care were the same ones Sila Luis used at LTC. Sila Luis made all the decisions at Professional Home Care.

20. CW 9 said that the majority, which CW9 quantified at about 90%, of patients at both agencies were paid kickbacks in return for allowing the agencies to use their Medicare numbers to bill Medicare for home health services.

Cash Withdrawals Evidencing Kickbacks

21. As I stated in my original Declaration, Defendants withdrew substantial amounts of cash from the companies' corporate accounts, apparently in order to pay kickbacks. This is consistent with the information provided by the Cooperating Witnesses who recruited patients, almost all of whom stated that they were paid kickbacks in cash (only one, CW4, was paid by check). Review of the financial information from just one LTC account at SunTrust Bank (ending in 0536) shows cash withdrawals by Defendants totaling over $1 million from February 2006 through June 2009.

22. Others in addition to Defendants participated in making these large cash withdrawals. Review of the financial information from this same account indicates that on at least two occasions, Defendant Luis and 5-6 others, including co-Defendants and family members of Defendant Luis, visited SunTrust Bank and, within minutes of each other, all cashed checks from an LTC corporate account. Each check was for $10,000 or just below that amount. *See* Exhibit B.[3] [fn.3: The checks themselves are not attached but are being produced to Defendant Luis.]

FURTHER DECLARANT SAYETH NAUGHT.

Pursuant to Title 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and is based upon my personal knowledge this *1st* day of February, 2013, in Miami, FL.

/s/ Clint E. Warren
CLINT E. WARREN
SPECIAL AGENT
FEDERAL BUREAU OF INVESTIGATION

Simultaneous Cash Withdrawals by Defendants and Family

LTC Acct # (SunTrust)	Payee (relationship to Def.Luis noted)	Date of Check	Check #	$ Amount	Time ck cashed	Date ck cashed
ending in 0536	Miriam Acevedo	11/5/08	309230	10,000.00	11:19:55	11/5/08
ending in 0536	Sila Luis	11/5/08	309231	10,000.00	11:21:58	11/5/08
ending in 0536	Lissandra Luis (daughter)	11/5/08	309232	10,000.00	11:22:13	11/5/08
ending in 0536	Mary Abreu (ex-daughter-in-law)	11/5/08	309233	10,000.00	11:22:29	11/5/08
ending in 0536	Kyusttin Abreu (son)	11/5/08	309234	10,000.00	11:22:45	11/5/08
ending in 0536	Wilfredo Luis (husband)	11/5/08	309235	10,000.00	11:23:00	11/5/08
		TOTAL $		60,000.00		

ending in 0536	Kyusttin Abreu (son)	12/12/08	309749	9,500.00	15:06:45	12/12/08
ending in 0536	Mary Abreu (ex-daughter-in-law)	12/12/08	309750	9,500.00	15:07:13	12/12/08
ending in 0536	Antonio M. Rodriguez (husband of niece)	12/12/08	309751	9,500.00	15:07:27	12/12/08
ending in 0536	Sila Luis	12/12/08	309752	9,300.00	15:07:39	12/12/08
ending in 0536	Miriam Acevedo	12/12/08	309753	9,550.00	15:07:51	12/12/08
ending in 0536	Elsa Ruiz	12/12/08	309754	6,325.00	15:08:05	12/12/08
ending in 0536	Wilfredo Luis (husband)	12/12/08	309755	6,325.00	15:08:29	12/12/08
			TOTAL $	60,000.00		

Case 1:12-CV-23588-PCH Document 135

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE 12-23588-CV-PCH

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

SILA LUIS,

Defendant.

Miami, Florida
February 6, 2013
Wednesday, 9:30 a.m.

Transcript of Probable Cause Hearing
Before the Honorable Paul C. Huck
Senior United States District Judge

Appearances:
For the government:

Susan Torres, A.U.S.A.
United States Attorney's Office
99 N.E. 4th Street, Third Floor
Miami, FL 33132 - 305/961-9331

For the defendant:

Howard Milton Srebnick, Esq.
Scott Srebnick, Esq.
Black Srebnick Kornspan & Stumpf
201 S. Biscayne Boulevard, Ste. 1300
Miami, FL 33131 - 305/371-6421

Reported by:

Robin Marie Dispenzieri, RPR
Official Federal Court Reporter
Wilkie Ferguson Federal Courthouse
400 N. Miami Avenue, Ste. 08S67
Miami, FL 33128 - 305/523-5659

[3] THE COURT: Good morning, everybody. Please be seated. Good morning. We are here on United States of America versus Sila Luis, Elsa Ruiz, and Myriam Acevedo.

May I have appearances first for the government?

MS. TORRES: Good morning, Your Honor. Susan Torres on behalf of the United States. Also with me at counsel table is FBI Special Agent Clint Warren.

MR. SREBNICK: Good morning, Your Honor. Howard Srebnick and Scott Srebnick on behalf of Sila Luis, who is present in court. Also with us at counsel table is Lesley Marin, our paralegal.

THE COURT: There's a couple of preliminary questions to raise now that I've had a chance to look at the cases and the memorandum of law.

Who has the burden of proof and on what issues, Ms. Torres?

MS. TORRES: The government has the burden to come forward and produce evidence sufficient to establish probable cause to believe that one of the offenses specified in Section 1345 has taken place and that there has been dissipation of assets received as proceeds from that criminal activity.

THE COURT: The indictment itself answers the first question.

MS. TORRES: We believe it does, Your Honor, as to the criminal activity and the amount of the loss.

[4] THE COURT: I think it does too.

Mr. Srebnick, let's talk about that. Do you have an argument you want to make?

MR. SREBNICK: Yes. For the reasons that I've stated, both in writing and at our previous hearings, we believe the burden is not satisfied by an ex parte indictment.

We believe that we're entitled, under the due process principle and under the statute that calls for a hearing, to a full-fledged adversarial hearing in which the government bears the burden of proof. We submit the burden of proof should be at the highest level, beyond a reasonable doubt.

THE COURT: I haven't gotten to that yet, but that's different than who has the burden.

I agree with the government. I looked at the Kaley decision and other cases, and I think it's pretty clear that that establishes probable cause, at least. I think probable cause is the standard.

So, with regard to the underlying allegation of criminal activity, I think the issue has been resolved once the indictment is passed by the grand jury.

The second burden to come in to show—what is the second point again?

MS. TORRES: The government also has to show, under 1345, that there has been dissipation of proceeds.

THE COURT: All right. Do you think the defendant has [5] any burden? Let's say you put on a prima facie case.

Mr. Srebnick, do you think you have a burden to show the inability to pay because there are no other assets? That's what U.S. versus Farmer says.

MR. SREBNICK: I certainly don't agree with Farmer, but we can meet the test in any event because we have the financial affidavit of the defendant, which we submitted to the government. I have the original to tender to the Court if the Court would like to accept it at this time.

It shows that the defendant has no other assets. The restraining order reaches up to $45 million worth of her assets, whether they be so-called traceable or substitute assets, and not even the government is contending that she has anywhere near $45 million.

THE COURT: I don't think we're going to be restraining $45 million. My recollection was a couple million dollars; is that right?

MR. SREBNICK: In any event, whatever the amount is, all of the defendant's assets are within the scope of the restraining order. Not all of them have been seized or physically frozen because there are assets in Mexico, which the defendant has disclosed, which are not technically within the hands of the government or the Court, but we

treat them, for purposes of this proceeding, as frozen, and they are not being touched for that reason.

[6] THE COURT: Okay. When the time comes, you can submit that affidavit. Are you going to submit Ms. Luis to cross-examination, the same as the government's witness, Agent Warren, is going to be submitted to cross-examination?

MR. SREBNICK: I would only do that if the Court rules that what she says cannot be used against her for the purposes of any future proceeding, no different than if she was being questioned for purposes of the appointment of counsel.

THE COURT: Have you discussed that with Ms. Torres? Ms. Torres, that seems like a reasonable limitation.

MS. TORRES: Your Honor, we have discussed this issue with Mr. Srebnick. We have told him that we are not ready to provide what would effectively be immunity to the defendant.

My understanding was that Mr. Srebnick was going to file something on that issue should he choose to pursue it. We have not seen that as of this time.

THE COURT: I'm inclined to let her testify and rule that testimony from this proceeding cannot be used against her in another proceeding.

MS. TORRES: Your Honor, may I address the burden issue on this point further? The only burden that the government has, under 1345, is to show that assets obtained as a result of the criminal activity were dissipated.

We have done that extensively in this case through information showing where the Medicare money went, how

it was [7] spent, how it was transferred abroad, transferred to family members, et cetera. There is no further burden for the government on that point.

To the extent that the defendant argues that the Court should exercise discretion to release certain funds for the defense of the criminal case, there, as the Court has indicated, it would be her burden to show she has no other assets.

That would only be for the purpose of the Court exercising its discretion to release some funds. Our position that we have briefed extensively is that there is no law requiring the Court to do that.

THE COURT: I'll tell you what, when the government finishes with its case, before Mr. Srebnick decides whether to put his client on or not, I'll make some rulings so we can understand.

It's my view that even if she shows that there are no assets available, I still may rule in favor of the government, in which case it's not necessary for Mr. Srebnick to put on his client. We'll cross that bridge when we get to it.

I'm reading Kaley. It struck me—in that case, the majority opinion in Kaley, authored by Judge Marcus, indicated that probable cause was the standard in that the indictment could not be challenged in any way, that that established the underlying criminal activity, and that a hearing was required [7] to establish the nexus between the criminal activity and the assets that are being sought to be frozen.

Do we agree that's the holding?

MR. SREBNICK: I agree that is the holding of Kaley.

MS. TORRES: That is what Kaley held, yes, Your Honor.

THE COURT: Let me pose a hypothetical to you. Kaley involved theft of a truck or some such things, some assets. What if Kaley involved Medicare fraud? What do you think the result would have been with regard to having a hearing to show or to establish a nexus between the fraud and assets in view of the fact that there is a substitute property provision in 1345?

MS. TORRES: Well, in a criminal proceeding, even if the activity is Medicare fraud, I believe the result would have been the same. Under a criminal case, the defendant would be entitled to a pre-trial hearing regarding that issue, the nexus, the traceability of the assets that were restrained.

However, Kaley relied on the forfeiture statutes to reach that conclusion. In this case, of course, 1345 allows for freezing of assets of equivalent value. The forfeiture statutes do not. That is the one distinction between this case and Kaley.

THE COURT: I know that. That's why I raised the hypothetical. What would have been the result?

MS. TORRES: In a criminal context, the result would have been the same. The defendant could have sought such a [9] hearing on traceability. In the context under 1345, that is not the case because the statute allows for freezing of what's called substitute assets.

THE COURT: That occurred to me. Mr. Srebnick, do you want to comment on that? It seems to me, had they been talking about Medicare fraud, a proceeding as we have here under 1345, that there wouldn't be the obligation to take the step of having a hearing just to establish the nexus between the criminal history and the assets that were frozen, because substitute assets were being treated the same as tangent assets.

MR. SREBNICK: In Kaley, as I understand the reach of Judge Marcus's decision, the whole point of the hearing in Kaley that Judge Marcus does authorize is to make sure that substitute assets are not being frozen because Title 21 853 does not authorize the restraint of substitute assets.

It seems to me that was the point of Judge Marcus's limited hearing, to make sure that only assets traceable to the indictment are the ones frozen.

THE COURT: I think that's true, but the crime was not Medicare fraud or bank fraud. It was brought under a different statute, under the criminal forfeiture statute, which requires a nexus.

Based on my reading of 1345, it doesn't seem there's a requirement to prove the nexus. All you have to prove is the [10] criminal activity generated X number of dollars, and then the government would be entitled to freeze any assets up to that amount.

MR. SREBNICK: That's what the government is trying to do in this civil proceeding before Your Honor. Had the government brought this exact same request for a restraining order in front of Judge Cooke in the criminal case and not proceeded under 1345, the government would not be able to restrain substitute assets. They could not have Judge Cooke restrain them.

THE COURT: Then Kaley would fit perfectly on that set of facts. But we're not before Judge Cooke, and it's a civil action brought under 1345, which does not require, it seems to me, a nexus between the criminal activity and tainted assets.

MR. SREBNICK: I understand that to be the government's view of the statute. I made arguments as to why the statute should not be so construed in my written

pleadings. We've discussed it before, but I do understand that to be the government's view.

THE COURT: It's my view.

Refresh my recollection. You say 1345 does not provide for the substitution of substitute assets in place of tainted assets when tainted assets are not available?

MR. SREBNICK: 1345 does allow the government to restrain assets of equivalent value. My view, as expressed in [11] the written pleading, is that the point of that is to make sure there's no dissipation of assets and that the government should not be able to seize those assets needed to retain counsel of choice.

The statute can be construed, given all the cases we cited, that it was never intended by Congress to reach substitute assets needed to defend the case.

THE COURT: Let me parse that out. You added something. I haven't gotten to any Constitutional right to counsel of choice or whatever it might be.

It seems to me that 1345 is pretty clear. You don't have to prove a nexus between the criminal activity and the assets which are being frozen.

MR. SREBNICK: Yes, that's the way it reads, yes.

THE COURT: So why do we need anything further? Once the government establishes that there is criminal activity in the nature of Medicare fraud, and that criminal activity generated, let's just pick a number out of the air, $40 million, the assets that are available and frozen are, let's say, $2 million, why does the government have to do anything further than that?

MR. SREBNICK: Under the statutory construction Your Honor has just indicated, the government would have

nothing further to do. You, therefore, would be overruling all of our objections and so holding.

[12] THE COURT: I think that's the law. That's the way I read the statute. I think it's pretty clear actually. Congressional intent, I think, is pretty clear, to cover exactly this type of situation that we have right here.

I'm not dealing yet with the right to counsel of choice. I'm just dealing with whether the government has fulfilled all of its obligation under 1345 to continue the freeze as a general proposition.

It's my view, after reading all the cases and reading your memoranda, that just by showing the indictment, the fact that the indictment includes an amount of proceeds of fraud, and assuming the government shows that there are assets that were frozen less than that amount, that that's all it has to do.

Then the burden would shift to you to convince the Court that, in balancing all the various interests, the Congressional intent that the government be protected in acquiring and freezing as many assets as possible pre criminal trial versus the client's right to counsel of her choice, I have to balance that out. I think that's where we are.

However, since we're here and everybody is prepared, what I suggest we do is go ahead and put on your evidence, both sides. We'll listen to the evidence, and then I'll make my ruling. I just wanted to give you some preliminary thoughts as to how I view all the cases that have been thrown at me. It [13] seems to me pretty clear.

So, Ms. Torres, are you prepared to move forward?

MS. TORRES: Your Honor, we are ready to proceed with the testimony of Special Agent Warren. His three declarations are in the record. I think the Court had

previously decided to credit those declarations as his direct testimony.

THE COURT: I've got them right here. I note there is, in the criminal forfeiture statute 21853, there's a rebuttal presumption that the assets involved in the attempt of the government to freeze those assets, that if the government shows that the assets were acquired during the period of criminal activity, and there's no other likely explanation for the obtaining of those assets, that there's a rebuttable presumption that they're tainted assets.

Would that apply here? I don't see it in 1345, but it is in 21 Section 553.

MS. TORRES: I think that's not in 1345 because the statute allows for the restraint of or the freezing of assets of equivalent value. Therefore, there doesn't need to be an analysis as to whether something is traceable or not.

THE COURT: Good point. We'll proceed with cross-examination. Is there anything else you want to do besides what you got in the declarations?

MS. TORRES: No, Your Honor.

THE COURT: Swear the witness.

[14] COURT REPORTER: Do you solemnly swear that the testimony you are about to give is the truth, the whole truth and nothing but the truth so help you God?

THE WITNESS: I do.

COURT REPORTER: Please state your full name and spell your last name.

THE WITNESS: Clint Warren, W-a-r-r-e-n.

THE COURT: Mr. Warren, would you state your professional occupation.

THE WITNESS: I am an agent with the FBI in Miami.

THE COURT: You have submitted three declarations in this case, the United States of America versus Luis, Ruiz, and Acevedo.

THE WITNESS: Yes.

THE COURT: If you were asked questions about the contents of those affidavits, would your answers be such that it would adopt the information contained in those three affidavits?

THE WITNESS: Yes.

THE COURT: Mr. Srebnick, you may proceed with the cross-examination.

CLINT WARREN, GOVERNMENT'S WITNESS, SWORN

CROSS EXAMINATION

BY MR. SREBNICK:

Good morning, Agent Warren.

[15] A. Good morning.

Q. Agent Warren, the conspiracy that is alleged in the indictment begins in 2006?

A. Yes.

Q. According to the indictment, there was a series of kickbacks that were alleged to have occurred?

A. Yes.

Q. As part of your declaration, you identified up to nine cooperating witnesses?

A. Yes.

Q. None of them have been identified by name for us, correct?

A. Not at this time.

Q. Correct?

A. Correct.

Q. I'd like to go through the dates regarding each of those cooperating witnesses so that we understand where we're at. The declaration indicates that those cooperating witnesses indicate or have told the government that kickbacks were being paid in connection with LTC and Professional to recruit patients. That's the essential allegation?

A. Yes.

Q. Do you have documents in front of you that will help you answer questions, or are you going to need any documents to assist you?

A. I have the three declarations.

[16]

Q. Okay, great.

I would like you to turn your attention to the second supplemental declaration. It's docket entry 96-1.

A. Yes.

Q. I'd ask you also to turn your attention to your first declaration. I think it's docket entry number 5. If you could turn, as to docket entry number 5, if you could turn to the page that addresses confidential witness number 1. I believe that's at page 11 of your declaration.

A. Yes.

Q. Do you see that, at docket entry 5, page 11, paragraph 33, confidential witness number 1 told you that he or she worked as a nurse for LTC and Professional from 2007 to about 2009, correct?

A. Yes.

Q. In your declaration 96-1, page 2, paragraph 4, confidential witness number 1 identified two patients who allegedly were part of the kickback scheme, correct?

A. Correct.

Q. The total amount of money for these patients that Medicare paid, according to your declaration, is $71,313.40?

A. Correct.

Q. Do you know the years when those kickbacks supposedly occurred? Is it fair to say that it would have been sometime between 2007 and 2009?

[17] A. Yes.

Q. I'd like you to turn to page 12 of your declaration at docket entry 5 regarding confidential witness number 2, paragraph 36.

Do you see that confidential witness number 2 worked, according to his or her statement to you all, at either LTC or Professional up until 2009?

A. Yes.

Q. Turning your attention to docket entry 96-1, page 2, paragraph 5, you identify, as part of confidential witness number 2's alleged kickbacks, 19 patients?

A. Yes.

Q. Totaling collections from Medicare of $1,168,805.96?

A. Yes.

Q. The kickback scheme and the collections from Medicare occurred up until 2009 with regard to confidential witness number 2, correct?

A. Yes.

Q. I'd like to turn your attention now to confidential witness number 3.

Your declaration, docket entry number 5, page 13, paragraph 41. This confidential witness number 3 also indicates that he or she worked for LTC and Professional up until 2009, correct?

A. Correct.

[18] Q. We go to your declaration at docket entry number 96-1, page 2, paragraph 6. Confidential witness number 3 identifies two patients for a total of $81,512.58?

A. Yes.

Q. Those revenues were up until 2009, correct?

A. I don't know when the revenues were. That's when the cooperator worked up until.

THE COURT: When you say "up until", was it 2007 through 2009?

THE WITNESS: 2006 through 2009, the conspiracy period.

THE COURT: Okay. Is that true for all of the cooperating witnesses?

THE WITNESS: Yes.

MR. SREBNICK: Judge, so I don't have to labor through this point, the end date for the cooperating witnesses regarding the kickbacks, this would be confidential witnesses 1 through 8, is 2009, correct?

THE WITNESS: Yes. LTC, they stopped operating.

BY MR. SREBNICK:

Q. Your investigation confirms that LTC, one of the two agencies named in the indictment, did not receive any Medicare dollars after 2009 from Medicare, correct?

A. Correct, they were terminated by Medicare.

Q. Now, I would like to show you what's in the record at [19] docket entry 96-2. This would be the forms that

purport to contain Sila Luis's signature, documents that you appended to your declaration, 96-2. Let me know when you're there.

A. The Medicare forms?

Q. Yes, please.

A. Yes.

MR. SREBNICK: Does Your Honor have a copy?

THE COURT: I'm not sure what you're talking about.

MR. SREBNICK: Docket entry 96-2, the Medicare forms that were attached to the declaration of Agent Warren.

THE COURT: The second supplemental?

MR. SREBNICK: Yes.

THE COURT: I have them, but I'm not sure that I can read them.

BY MR. SREBNICK:

Q. Let's look at the dates, is what I want to focus on. This is page 1 of that document number 96-2.

Do you see that it's some sort of certification statement?

A. Yes.

Q. Do you see that it has the name Sila Luis with some signature there?

A. Yes.

Q. You see the date is August 5th, 2003?

A. Yes.

[20] Q. We turn the page to page 2, same date, August 5th, 2003, with a signature date of June 23rd, 2003. Do you see a couple of dates there?

A. Yes.

Q. Everything is 2003, correct?

A. Correct.

Q. We turn to page 3, the signatures also have a date of 2003?

A. Where?

Q. Bottom right of the page, page 3 of docket entry 96-2.

A. Yes.

Q. We turn to page 4, also 2003?

A. Yes.

Q. We turn to page 5, also 2003?

A. Yes.

Q. Page 6, I don't see any date there.

Page 7, correct me if I'm wrong, I don't see any date there.

We go to page 8, it appears to have a date of 2005. It looks like May 16th, 2005.

A. Yes.

Q. We turn to page 9, the date is 2003?

A. Yes.

Q. Page 10, the date is 2004?

A. Yes.

Q. I would like you to turn to page 11. Before we get to page [21] 11, these forms, where did you get them to append to your declaration? What are they?

A. The Medicare enrollment application from Medicare.

Q. So you obtained them through Medicare?

A. Yes, through Safeguard Services, which is an intermediary to Medicare.

Q. These are documents maintained by Medicare and/or Safeguard as part of the enrollment process?

A. Yes.

Q. Now I would like to talk about pages 11 through 14.

What is that document?

A. It was a document as part of the enrollment package. It's labeled "Penalties for falsifying information".

Q. Can we look at pages 11, 12, 13, and 14. Do they appear to be part of the same package of information, 1 of four, 2 of four, 3 of four, and 4 of four? Do you see that on the bottom?

A. Yes.

Q. Is this the first time this type of document is being executed by, it says here, Sila Luis?

A. The first time that this particular document is being executed?

Q. I have not seen any other one like this. That's why I'm asking.

A. Yes, this is the only document of its kind in the application.

[22] Q. Let's look at the date. Do you see on the last page it appears to bear a signature date of January 6th, 2012?

A. Yes.

Q. 2012 is when this investigation against Ms. Luis was already ongoing, correct? The cooperators had already started cooperating against Ms. Luis?

A. Yes, the case was ongoing.

Q. Are you sure this is the document that was submitted to Ms. Luis as part of any kind of enrollment program, or could it have been a document as part of the

investigation to get her to sign a document that could be used against her as evidence?

A. This is a document that was given to us by Medicare, so I'm not really sure who—I mean, she signed it 1/6/2012. They say the effective date was 3/3/2003. So I don't know the history.

Q. Did you get this document, pages 13 through 17, together with all the previous documents in this exhibit as part of a package from Medicare?

A. Yes, it all comes as one package.

Q. Turning now to page 15, 16. I don't see any dates on those documents, we agree?

A. Yes.

Q. The last page, page 17, appears to bear a date of 2004. Do you see that?

A. Yes.

[23] Q. Can we agree, based on what we just reviewed, that the only document that Ms. Luis appears to have signed in connection with this production by Medicare are documents up until 2005 and nothing until 2012?

A. Yes.

Q. Nothing in '06, nothing in '07, nothing in '08, nothing in '09, nothing in 2010, nothing in 2011?

A. That's when they originally signed up with Medicare to get their provider number. If information does not change, then there wouldn't be any further signatures.

Q. Let me ask you, going back to pages 13 through 17, you told us earlier that LTC had been terminated by Medicare sometime around 2009?

A. Yes.

Q. Let's take a look at page 17. Do you see this is a document that relates particularly to LTC? It's at the bottom of the page, second line from the bottom, LTC Professional Consultants, Inc.

A. Page 17?

Q. Page 14 of 17.

A. Yes.

Q. At that time, LTC was not submitting claims to Medicare, right?

A. At which time?

Q. On January 6th, 2012, LTC was not submitting any claims to [24] Medicare?

A. Correct.

Q. LTC had not submitted any claims the year before in 2011, correct?

A. Correct.

Q. Nor in 2010, correct?

A. Correct.

Q. What is the purpose of a document asking for Ms. Luis's signature in 2012 on behalf of LTC that is not submitting to Medicare?

A. I'm not sure. They say the effective date was 3/3/2003. I'm not sure who sent that to her or how she obtained it.

Q. Got it.

Are you certain that neither you nor any of the agents participating in the investigation, are you sure whether any of them had anything to do with this document, pages 13 through 17, being sent to LTC to solicit a signature from Mrs. Luis; are you certain?

A. Yes.

Q. You're certain that none of the agents working on this investigation, you're certain they had nothing to do with it?

A. Yes, to the best of my knowledge, yes.

Q. Now, I understand that the government is objecting to the disclosure of the names of the confidential witnesses, their patients that supposedly were involved in the kickback scheme, [25] so I'm going to ask you these questions understanding that you're not going to reveal the names of the patients, the names of the witnesses, or any of the other sources of the information.

Judge, I understand that to be the case at this time?

THE COURT: Yes, sir.

BY MR. SREBNICK:

Q. I would like to ask you about confidential witness number 1. Now, is it fair to say that confidential witness number 1 is someone who was involved in criminal activity regarding fraudulent submissions of Medicare paperwork?

A. What do you mean by Medicare paperwork?

Q. Let me rephrase it.

Was confidential witness number 1 involved in a fraud before she or he met with the government to disclose information about Sila Luis?

A. She was involved in a previous fraud, yes.

Q. Is it fair to say that confidential witness number 1 was being accused by the government of criminal activity when he or she, I think you said she, when she cooperated with the government?

A. Yes.

Q. Fair to say that cooperating witness number 1 was attempting to obtain benefits from the government by implicating others?

[26] A. CW number 1 was already out of jail at the time she started providing information to us or shortly thereafter.

THE COURT: When you say out of jail, you mean she had been sentenced and she completed her sentence?

THE WITNESS: She had completed her sentence, yes. Now she is out of jail.

BY MR. SREBNICK:

Q. Let's start over, because this is really important.

I don't know the name officially, but I think I know who it is.

THE COURT: Well, you have a gender, that's for sure.

BY MR. SREBNICK:

Q. Do you have a date when confidential witness number 1 first started cooperating and giving information to the government? We have the 302s.

A. Not off the top of my head.

Q. Let me see if I can—

MR. SREBNICK: May I approach to show the witness a document?

THE COURT: You may.

BY MR. SREBNICK:

Q. I'm showing you a redacted 302 that bears your name. Does that look familiar?

A. Yes.

Q. Does that indicate that—I know you haven't had a chance [27] to look at it, but it appears that the date that the interview took place of confidential witness number 1 is sometime in May of 2011?

A. Yes.

Q. Now, cooperating witness number 1 had entered into a plea agreement with the government to cooperate?

A. Yes.

Q. That plea agreement was back in July of 2010?

A. I don't know the exact date, but that sounds approximately right.

MR. SREBNICK: For the record, I'm assuming, and I may be mistaken, Judge, but I'm assuming that cooperating witness number 1—may I say the name? I don't want to do anything that's inappropriate.

THE COURT: Let's have a sidebar on that. I think the cat is out of the bag anyway.

[Proceedings at sidebar follow]:

MS. TORRES: I think the cat's out of the bag with regards to naming this witness, Your Honor. My only concern is putting their name on the record, which will be public.

The government's investigation continues with regard to these individuals and to other agencies that are not even involved in this case. That is my only concern, and that's why we did not want the interview reports to be put into the public record. But the agent knows who the witness is and can answer [28] questions regarding the witness without mentioning the name.

THE COURT: Agreeable?

MR. SREBNICK: I understand.

THE COURT: Should we advise the witness that Mr. Srebnick knows who the name is?

MR. SREBNICK: I believe CW number 2 is [unintelligible].

THE COURT: I assumed that you could put two and two together and figure out who the people were.

Agent, come on up. He knows who CW1 is. He thinks he knows the others. When you get on the stand, we're not going to mention names since it's an ongoing investigation.

MR. SREBNICK: We surmise that CW number 1 is {}.

CW number 2 is {}.

We surmise that CW number 3 is {}.

We are surmising that CW number 4 is {}.

We are surmising that CW number 5 is {}

We have surmised that CW number 6 is {}.

We have surmised that CW number 7 is {}.

We don't know who CW number 8 is. We're not sure.

CW number 9, we surmise is {}.

That's all.

THE COURT: Let me talk to these two, the government.

MS. TORRES: I have no problem confirming the information is correct. Again, I just don't want it in the [29] public transcript.

THE COURT: Mr. Srebnick, could you come back, please.

MS. TORRES: We confirm that is correct. Just don't say the names on the stand.

[Proceedings in open court follow]:

BY MR. SREBNICK:

Q. Okay, with regard to CW number 1, do you recall that she was sentenced January of 2011 to a period of 18 months?

A. That sounds right.

Q. She was granted a self-surrender date later in 2011, so she was still free, not withstanding her sentence, as late as November of 2011?

A. That sounds right.

Q. So, at the time that she met with you starting at—I believe we established the date in May of 2011, she had a sentence hanging over her head, and she was cooperating with you trying to reduce that sentence?

A. She was previously a cooperator, yes.

Q. At the time she was meeting with you, she had the hope that, by implicating others, the government will file a Rule 35 on her behalf?

A. I assume that was CW1's hope, but she had already received a previous benefit.

Q. She was hoping for more benefits by continuing to cooperate, right?

[30] A. I assume.

Q. She had previously met with the government prior to May of 2011, was supposed to have given you all the information she had, but had not implicated Sila Luis prior to May of 2011, correct?

A. She—when we debriefed her, CW number 1 discussed her role as a nurse at LTC.

Q. I think you indicated that, by May of 2011, she had already cooperated with the government, had received a benefit for the cooperation, correct?

A. Correct.

Q. In fact, the government moved for a reduction of CW1's sentence in January of 2011 based on whatever cooperation CW1 had given up to 2011, correct?

A. That sounds right.

Q. January of 2011, she gets the benefit of cooperation. She gets sentenced. She's given a voluntary surrender. Only after she's sentenced to 18 months and is hoping to further reduce her sentence does she first implicate Sila Luis in any criminal activity, correct?

A. Well, that's when we started debriefing her.

Q. Sir, you had already debriefed her to the point where she had earned, by January 2011, a sentencing reduction. Wasn't she supposed to give you all the information she had prior to her sentencing, prior to her getting her first sentencing [31] reduction?

A. She was debriefed on another matter.

Q. Did she ever implicate Sila Luis prior to her sentencing to 18 months?

A. I believe she had said that she worked at this company. At some point, when we started debriefing her more, we debriefed her in further detail.

Q. So the answer is she never implicated Sila Luis until after she got sentenced to 18 months, after she started cooperating, and when she was trying to get a further reduction in her sentence; isn't that true?

A. Again, she was—Q. Isn't that true?

A. She was cooperating in a previous matter, and we found out that she worked at this company, and we continued to debrief her in further detail.

Q. I would like to ask you a few more questions about CW number 1.

According to your declaration, CW number 1 alleges there were kickbacks associated with two patients, right?

A. Yes.

Q. Now, I've looked at the reports that you have provided redacted. Isn't it a fair statement that, other than

naming Sila Luis as somebody who was the owner of the agency, CW number 1 doesn't actually accuse Sila Luis of having been [32] involved in the kickbacks regarding those two patients, correct?

A. She did not interact with Sila Luis. She knew that she was the owner of both agencies, but she did not interact with her.

Q. Now, CW number 1 was employed by, was it LTC?

A. Yes.

Q. She received payments for working at LTC?

A. Yes.

Q. You're able to confirm that she was a paid employee of LTC?

A. Yes.

Q. That's CW number 1, if you could bear with me.

Has CW number 1 ever testified under oath as far as you know?

A. I believe she did. I can't remember.

Q. You can't remember.

A couple more things about CW number 1 just to tie that up. Didn't CW number 1 indicate to you that LTC and Professional, the two agencies that are part of this case, require that the nursing notes be done by hand as opposed to by computer, correct?

A. Correct.

Q. The reason CW number 1 was told to do them by hand was because—well, it was also required that the notes not be done at the offices of LTC or Professional, but be done in the field at the site where the nurse services were given, right?

[33] A. Yes.

Q. This was to ensure that the nurse who's providing service is making contemporaneous notes by hand, not putting them in later at a computer terminal after the fact?

A. Yes, LTC did not want their notes being done inside their office.

Q. Isn't it true that CW number 1, notwithstanding that instruction from the owners of LTC and Professional, CW number 1 was paying somebody to falsify her notes; is that what she told you?

A. Yes, $2 per note.

Q. Isn't it true that CW number 1 was terminated by LTC and Professional over that issue of the note-taking?

A. She was terminated due to an argument over falsifying the notes. Yes, she didn't want to put down a particularly blatant symptom. CW1 had an argument, and ultimately, CW1 was fired.

Q. CW number 1 had already been involved in falsifying notes at other agencies, and she got indicted for that, correct?

A. Yes.

Q. Suddenly, now she's going to become altruistic and she's claiming to you, as part of a debriefing, that the reason she was terminated is because suddenly she didn't want to be involved in falsifying notes; is that her claim to you?

A. No, but it was so blatant that I guess she didn't feel comfortable.

[34] Q. Is it possible, since you weren't there and you're just having to hear what CW1 had to say, that CW1 was fired because he or she—she I should say—was not following the protocol of doing the notes as required by LTC and Professional? Can you rule that out?

A. Rule out?

THE COURT: Do you know one way or the other? I'm not interested in what is possible. I want to know whether he knows or doesn't know.

BY MR. SREBNICK:

Q. Other than what CW number 1 told you, do you have anybody confirming that event other than CW number 1?

A. We have—

Q. The event of why she was fired.

A. CW number 7 confirmed that she was fired over an argument.

Q. Anything beyond what the substance of the argument was?

A. No.

Q. So two people agree there was an argument, CW1, CW7, and CW1 is the only one who tells you that the argument was that CW1 didn't want to falsify notes?

A. No, she didn't say she didn't want to falsify notes. She was uncomfortable with particularly blatant—whatever it was, symptom that needed to be in the notes.

Q. CW1 was unable to identify Sila Luis in a photograph, correct, when you questioned CW1? Do you recall that being [35] documented in one of reports?

A. That she was not able to identify Sila? She identified Sila by name as Sila was the owner.

Q. But when shown a photograph of Sila Luis as part of a photo spread, CW1 could not pick Sila Luis out of a photo spread, correct?

A. I can't remember if we showed CW1 a photo or not of Sila Luis. We showed a lot of photos to a lot of the CWs.

Q. I have your report if that would refresh your recollection.

A. Please.

MR. SREBNICK: May I approach?

THE COURT: Yes, you may. You don't have to ask me anymore.

BY MR. SREBNICK:

Q. Let me show you what appears to be a report by Special Agent Crespo, but it also bears your name. It's dated July 11th, 2012. I highlighted and marked for you to read the paragraph for which I'm surmising the point I'm trying to make.

A. She identified this individual as someone who acted as an owner at both agencies, was unable to say if it was Sila, meaning put the name and the face together.

Q. So tell us what happened. You're interviewing this witness in 2012, which is just a few months ago. You show the witness a photograph. I assume it's a photograph of the lady that's sitting at counsel table?

[36] Do you see the lady there?

A. Yes.

Q. I will stipulate that's Sila Luis for the purpose of this discussion.

Did you show CW1 a picture of Sila Luis?

A. Yes.

Q. Was the witness, CW1, able to identify her?

A. Again, she was able to I.D. that photo as—she recognized her as an owner there, but could not say that

that was her name, Sila. She did not say—she couldn't put the face and the name together.

Q. CW number 1 also told you that patients would be discharged if it was determined that the patient did not meet criteria, right? For example, a patient, I think in October of 2008, was discharged for noncompliance?

A. What do you mean, noncompliance?

Q. The patient didn't meet criteria, either was not homebound or—

A. That may have happened occasionally, yes.

Q. So what CW1 confirmed was that LTC and Professional, when it was determined that the patients did not qualify, would terminate the patient, right?

A. No, a lot of the patients did not qualify.

Q. But when management learned about it, I understand the nurses—the CWs, some of them are nurses, apparently were [37] claiming to bill for services that the nurses weren't rendering, but isn't it true that, from your interview with CW1 and others, there was a system in place at LTC and Professional to make sure that the patients actually qualified for services?

A. I would say that's not accurate. All the CWs who interacted with the patients advised us that a lot of patients did not qualify for services.

Q. I understand that. The question is what was reported back to management.

Let me jump ahead for a moment.

You interviewed CW number 9, right?

A. Yes.

Q. CW number 9 held a management position?

A. Yes.

Q. Did you ask CW number 9, who's now cooperating on this issue—did CW number 9 ever admit to you, tell you that she, as upper level management, was agreeing to provide or bill Medicare for services not rendered or not medically necessary?

A. Not at this time. She identified that the vast majority of the patients received kickbacks. Right there, right off the bat, patients wouldn't qualify.

Q. When I say qualify, meaning needed the services and were provided the services, putting aside kickbacks for the moment. Did you ask CW number 9, upper level management, that question?

A. Not at this time.

[38] Q. What are you waiting for?

MS. TORRES: Your Honor, if I may object. I believe we previously discussed the issue of medical necessity versus kickbacks. My understanding was that the hearing today would be focused on the issue of kickbacks.

THE COURT: I sustain the objection.

BY MR. SREBNICK:

Q. Agent Warren, I would like to turn your attention to CW number 2.

According to your declaration, CW number 2 claims to have been involved with kickbacks regarding 19 patients. Do you see that?

A. Yes.

Q. CW number 2 is another witness who was speaking to you as part of an effort to gain a sentencing reduction, right?

A. Yes, she was involved in the previous matter, yes.

Q. CW number 2 is also somebody who was involved in a fraud, correct?

A. Correct.

Q. A fraud beyond the alleged fraud that's part of this case, LTC and Professional. CW number 2 was involved in frauds independent of LTC and Professional, correct?

A. Yes.

Q. CW number 2 was indicted for committing frauds not involving LTC and Professional?

[39] A. Yes.

Q. CW number 2 entered into a plea agreement in an effort to reduce CW2's sentence, correct?

A. Yes, she entered into a plea agreement.

Q. As part of that plea agreement, CW number 2 eventually spoke to the government and attempted to provide information about LTC and Professional, correct?

A. Yes, she provided information.

Q. Now, CW number 2 actually testified in open court against a doctor in her case, correct?

A. I believe she did, yes.

Q. Okay. Notwithstanding her testimony in front of a jury and a Judge, the jury found that doctor not guilty, correct?

A. Correct.

Q. CW number 2 pointed a finger at another citizen of our community, claimed that that citizen was involved in criminal activity, and the jury rejected her testimony, correct?

A. I wouldn't say they rejected her testimony. They made that decision.

Q. Actually, they rejected her testimony as corroborated by others, correct? She wasn't the only witness who testified against that doctor, right?

A. That's correct.

Q. Is it fair to say that at least one jury of our community came to the conclusion and rendered an opinion that she's not a [40] truthful person?

A. I wouldn't say that. I don't know what their position was on what issue or how they were thinking.

Q. Now, CW number 2 was also somebody who confirmed that LTC and Professional required that the notes made by nurses be made off site, that the nurses aren't supposed to wait to come back to the office to prepare notes, correct?

A. Yes.

Q. Isn't it true that CW2 admitted to you that she would have to sneak around and do notes in the parking lot because management would not have approved CW2 doing the notes at the office?

A. She paid two employees at LTC $2 per note to do the notes, to falsify them. They would meet in the parking lot to exchange the notes.

Q. All of this was done in an effort to conceal it from management, correct?

A. I think management didn't want to know about it. Management didn't want notes being conducted in the office because the whole scheme is set up to be compartmentalized.

Q. Is this what you're surmising, or is this what the witness told you?

A. No, no, this is what I'm surmising.

Q. The witness simply told you that management prohibited these nurses from waiting to come to the office to do the [41] notes, right?

A. Yes.

Q. And these nurses would sneak around and figure out a way, either paying other people or what have you, to create notes against company policy without the knowledge of management, without the knowledge of Sila Luis, correct?

A. Well, the—Q. Correct?

A. Again, they didn't want the notes being conducted in the office. So the QA Department is the one who assisted with helping to falsify these notes and making sure that the POC matched the nursing notes.

Q. The nurses were actually, essentially, bribing some low level employee at LTC or Professional to help do these notes against company policy, correct?

A. They were employees of the QA Department.

Q. Isn't it true that CW number 2 did not implicate Sila Luis in the kickback issues that you've described? Actually, according to the report, CW number 2 implicated—let me just see if I can say the name.

According to your report, it was Elsa Ruiz who CW number 2 implicated, not Sila Luis, right?

A. Well, Elsa Ruiz paid CW2 her kickbacks. CW2's patients—she was a nurse for another patient recruiter that had the relationship with Sila Luis.

[42] Q. I'm not sure what you just said.

My question is the kickbacks that are allegedly being paid—I think it's 19 patients that are at issue?

A. Yes.

Q. According to your reports, the people involved in that kickback arrangement, according to CW number 2, is CW2 and Elsa Ruiz, right?

A. Correct. Again, CW number 2 saw the patients of a patient recruiter who she had to pay $300 to that recruiter to be assigned that group of patients. That patient recruiter was friends with Sila Luis and was paid kickbacks for those patients.

Q. Okay. This recruiter, is this somebody who's cooperating with the government? Because I'm not sure who you're talking about.

A. Yes.

Q. So CW2 and an unnamed recruiter, cooperator, have we been provided the reports of that so-called recruiter or have any information about that recruiter?

A. I don't believe so.

Q. What you're reporting to the Court now, is this information that came from CW2 or from this cooperating recruiter?

A. It's information that came from both.

Q. So you've interviewed both?

A. Yes.

[43] Q. I don't have those reports, so I'm not in a position to address that other person at this time.

I can address CW2. It appears, based on your reports, that CW2 has told you that the kickback scheme that she was involved in involved her and Elsa Ruiz; isn't that a fair statement?

A. Yes, Elsa paid her kickbacks.

Q. I think you said that CW2 described for you her perception of a relationship between Sila Luis and this cooperating recruiter, right?

A. Yes.

Q. But was not a witness or personally observed any financial activity between this recruiter and Sila Luis?

A. Not to my knowledge. They had the relationship, and this recruiter was paid by Sila for these patients.

Q. That's hearsay on the part of A. That's what CW2 told us.

Q. Told you what this unnamed recruiter told her?

A. Yes.

Q. Did she, CW2, observe these so-called kickbacks?

A. She paid her own patients, obviously.

Q. Forgive me.

Did CW2 observe, according to what she told you, Sila Luis paying this recruiter, observe with her eyes?

A. I don't know. I don't think so. I don't know.

[44] Q. Now, CW2 was a nurse?

A. Yes.

Q. Worked for—was it LTC?

A. Yes, LTC and Professional.

Q. She was an employee of LTC?

A. Yes.

Q. Was she also an employee of Professional?

A. Yes.

Q. Two of the patients that CW2 was supposed to be servicing were her own parents, correct?

A. Yes.

Q. It turns out she was using her own parents as part of some effort to bill Medicare through LTC or Professional, right?

A. She used her parents in the scheme, yes.

Q. I don't know who this patient recruiter is, but is that recruiter also somebody who was either indicted or entered into a plea agreement and has motive to implicate others in order to benefit him or herself as part of a cooperation deal?

A. Not at this time.

Q. Hasn't been indicted yet?

A. Not at this time.

Q. This person met with you as part of a proffer session?

A. Yes.

Q. For, like, cooperating in the hopes of not getting indicted kind of thing?

[45] A. I guess that would be her hope, but obviously, the government does not make any promises.

Q. Sometimes you do, but not in this case, right?

A. No.

Q. I'd like to ask you some questions now about CW number 3. CW number 3, according to your declaration at docket entry 96-1, page 2, paragraph 6, identifies two patients in the kickback scheme.

A. Yes.

Q. Okay. CW number 2 was also a nurse and, in fact, had even a little bit of a higher position, like a Director of Nursing at LTC?

A. At Professional.

Q. At Professional. She was a nurse at LTC?

A. Yes.

Q. She was employed at those locations until—was it 2009?

A. Yes.

Q. To get to the bottom line, isn't it fair to say, in all of the interviews you've had with CW number 3, she did not indicate any contact with Sila Luis regarding kickbacks?

A. She knew Sila Luis was the owner, but no, not regarding kickbacks.

Q. So I'm correct to say that, in all the interviews of CW3, she does not implicate Sila Luis directly in a kickback scheme, correct?

[46] A. It was Elsa Ruiz who paid her the kickbacks.

Q. So CW3 implicates Elsa Ruiz, who is a co-defendant in this case, in the kickback scheme?

A. Yes.

Q. Now, I have a redacted report, and it appeared originally that—I don't see the names of the patients, of course, in the reports you've given us, but it does indicate that there were three patients, names unknown, that she spoke of, but your declaration only identifies two at this time.

A. Yes.

Q. Did it turn out that CW3 named a patient that, in fact, was not actually a patient of LTC or Professional?

A. I believe, when I ran the Medicare data, that patient was not billed. It was either that patient was not billed or that patient was only billed for a RAP payment.

They originally submitted a bill for that patient, but there was no final bill. Either he was discharged or somehow he or she left.

Q. Even though CW3 claimed there were three patients involved in the kickbacks, it turned out that your independent investigation revealed that at least one of them had never been billed by LTC or Professional or was discharged or something that led to the conclusion that Medicare did not pay LTC or Professional for that third patient, correct?

A. Correct, just the two patients.

[47] Q. Now, the Director of Nursing, as a nurse, she must have had contact with dozens and dozens, perhaps hundreds of patients, correct?

A. Not necessarily. She had her group of patients that she saw as a nurse, and then she performed the other duties in the office.

Q. How many patients did CW3 either service or supervise?

A. She had her two patients, and she was in the office as the DON overseeing mainly the paperwork and running that aspect.

Q. Is CW3 also somebody who was indicted in a separate case involving other agencies, not LTC or Professional?

A. Yes.

Q. Like the other two witnesses that precede her, CW3 cooperated with the government in an effort to reduce her sentencing exposure, correct?

A. Yes.

Q. She was, indeed, given two Rule 35s, right?

A. I believe so, yes.

Q. So she started cooperating and then decided to continue cooperating in order to further reduce her sentence, right?

A. What do you mean? She cooperated the whole way through.

Q. Right, but she didn't get one Rule 35 motion. She actually has gotten two already, right?

A. Yes.

Q. So the government, what, held one back to hold that over [48] her head, or how did that work?

A. No. Her continued cooperation—it was the prosecutor and the Judge's decision to give her a Rule 35.

Q. Do you know if CW3 ever testified under oath?

A. I don't think so.

Q. Now, before I move to CW4, any of the statements that CW1, 2, or 3 have given the government about LTC, Professional, or Sila Luis, have any of them been under oath?

A. Have any of them what?

Q. Been under oath?

A. No, but they know that, in their cooperation with the government, if they do not tell the truth, there's consequences, obviously, for not telling the truth.

Q. And if they don't implicate other people, the consequence is they don't get a Rule 35, right?

A. Well, if they tell the truth and they're cooperating, then they may or may not receive a benefit. It's out of my hands.

Q. I'd like to ask you now about CW number 4.

According to your declaration, docket entry 96-1, CW number 4 identified ten patients, correct?

A. Yes, that's correct.

Q. Now, CW number 4 actually incorporated a staffing agency, correct?

A. No, he had a company.

Q. I'm sorry?

[49] A. He had a company.

Q. He had a corporation?

A. He had a corporation.

Q. And he would bill either LTC or Professional. Do you know which one?

A. No, he did not bill them.

Q. Was he paid through that corporation by LTC or Professional?

A. Yes.

Q. Now, CW number 4 was also indicted for healthcare fraud, right?

A. Yes.

Q. Healthcare fraud that CW4 committed independent of LTC and Professional, correct?

A. Yes.

Q. When CW number 4 was arrested, the government sought his pre-trial detention based on the government's assessment that he couldn't be trusted to return to Court as he was supposed to promise as part of his bail; isn't that true?

A. They sought pre-trial detention, yes.

Q. And argued he couldn't be trusted to comply with Court orders to return to Court, correct?

A. I'm not sure what they argued. I wasn't a part of that matter.

Q. But you know the government sought pre-trial detention and [50] argued he was a risk of flight?

A. More than likely, yes.

Q. And you know what that means, right?

A. Yes.

Q. You know that the government's position, as to CW4, was that there was a concern that the government had that he couldn't be trusted to return to Court. You know that, right?

A. It's always a concern.

Q. This CW number 4 entered into a plea agreement. As part of his plea agreement, he's trying to reduce his or her sentencing exposure by implicating others, right?

A. Yes, he entered into a plea, yes.

Q. Now, as to CW4, didn't CW number 4 confirm that patients at LTC and Professional, many of them, indeed, were homebound and did qualify for services?

A. He said the vast majority were not homebound. I believe he said there may have been a few that he thought were homebound, but all of his patients were paid kickbacks.

Q. Didn't he say that LTC was strict about who LTC qualified for patients?

A. He said they were more strict than other agencies.

Q. Isn't it true that he said that he did not see Sila Luis very often?

A. He met with Sila Luis initially. They discussed the kickback rates. After that, yes, he did not see her that [51] often. He went to the office, received his checks.

Q. Who did he claim to receive his checks from?

A. Somebody in the office, either Elsa or another office employee. The checks would be there already waiting.

Q. One more point about LTC and Professional. Didn't he tell the government that once a patient was determined

not to qualify for home care, LTC and Professional did not try again to make that patient qualify as other agencies tried to do?

A. Sometimes he said they would, and a lot of times they would not.

Q. I'm looking at a report of Kathryn Batt, B-a-t-t. Is she another agent?

A. Yes.

Q. Did you review her report as part of your preparation for this case?

A. Yes.

Q. She reports having interviewed CW number 4, and she documents, quote, "At LTC and Professional, once the patient did not qualify for home care, they did not try again. They did not send out another nurse." A. Yes.

Q. What that means, for those of us that are new to this, some agencies try to fit a square peg in a round hole. They try to make the patient qualify, but that was not the protocol at LTC and Professional. That's what CW4 told Agent Batt?

[52] A. They had plenty of patients. They didn't need to force the issue, I guess, is what he's trying to tell us.

Q. How many times did you personally interview CW number 4? Just once, because I only have one report with your name on it.

A. Three times.

Q. Okay, now I see. You authored one report, but you were present for other interviews?

A. Yes.

Q. Got it.

So, to summarize CW4, he claims he discussed a kickback arrangement with Sila Luis. That's what he claims, but in fact, isn't it true that he admits that neither Sila Luis—excuse me, he admits that Sila Luis did not pay him, correct?

A. You mean physically hand him a check?

Q. Correct.

A. Correct, but some of the checks were signed by Sila Luis.

Q. And the checks were made payable to a corporation?

A. Yes.

Q. Now, was that corporation—did that corporation have a license to provide home healthcare?

A. Not to my knowledge.

Q. Have you investigated that?

A. That they had a license?

Q. Yes, that CW4 was holding himself out to be in home health. [53] He, himself, was a certified home health aid; was he not?

A. Yes, under a guise of a home health aid. He's a recruiter under the guise of a home health aid, yes.

Q. When you say "under the guise," he was actually licensed by the State of Florida, right?

A. I don't know if he was licensed by the State of Florida, but yes, he was a home health aid.

Q. He was licensed to do that service, correct?

A. Again, I'm not sure if he was licensed or not, but he was a home health aid.

Q. He incorporated some company and at least held himself out to be someone who provided home health services to patients, correct?

A. Well, he never provided home health services to patients.

Q. Didn't he give you a whole background about how he worked as a home health aid. He took care of patients. He drove to see doctors. It was in your report.

A. That was a previous investigation. That's another investigation, not the LTC matter.

Q. That's who he held himself out to be to the public. As far as the public could see, he was a real home health aid providing real services to patients, right?

A. Not for LTC.

Q. I know that's what he's telling you now, but your investigation reveals that, indeed, he had held himself out to [54] be such a person and, indeed, he admits that he did provide real services to patients when he started out, right?

A. In the very beginning, yes.

Q. So at the time that he has a relationship with LTC and Professional, he had already been involved in the home health business providing home health services for patients, right?

A. He was also recruiting patients for other agencies also.

Q. I understand that that he committed criminal activity, that he was involved in fraud involving other agencies, but he was representing himself to be, and indeed was in fact, a home health aid qualified to provide those services to patients?

A. He held himself out to be a home held aid. LTC were very strict about wanting to see that documentation because he was receiving such high dollar value of checks that it was a way to help disguise that he was a patient recruiter.

Q. Did you conduct an investigation of CW number 4? Were you involved in that investigation?

A. No, I was not.

Q. Do you know that CW number 4 was married and that his wife was also a home health aid? Do you know that one way or the other?

A. Yes.

Q. Do you know if CW number 4 also employed a third person as a home health aid?

A. I don't remember. Possibly.

[55] Q. And that these three people were holding themselves out to have a business that provided home health services and indeed were qualified, had they wanted to do it right, to provide home health services?

A. Yes, but in fact, they were patient recruiters.

Q. I understand what they did. That's why he got indicted, and that's why he's facing jail, and that's why he or she is looking to point fingers. We understand that.

But to the man on the street who sees these three people with licenses and qualifications, they appear capable, and indeed were capable, to provide home health services had it been done in accordance with the law?

A. Yes, but—

Q. I've heard the but.

With regard to CW number 4—let me just show it to counsel. The indictment in the case lists a series of checks

as part of the overt acts from 2007, December. That's docket entry 3 of the criminal case, page 12 and page 13 and 14, I believe.

In any event, if I show them to you, do you see these are the checks to the company, without naming the company related to CW number 4? You can ignore the handwritten notations that we've made for preparation.

A. Some of these checks I can't remember which ones go with which person to which company, but the CW, some of the checks [56] are in there.

Q. Some of the checks in the indictment related to CW4's company, right?

A. Yes.

Q. We're talking about checks in the amount of anywhere from $9,900 down to $4,000, something to that effect, right?

A. Yes.

MR. SREBNICK: Your Honor, I'm going to turn to CW5. Whenever it's an appropriate time for a morning break, I can break at any time.

THE COURT: I don't need a break. If you want a break, we'll take a break. We're going to go until about 12:10. Anybody need a break?

MR. SREBNICK: I might need one before then, but not now.

THE COURT: Let's plow forward.

On CW4, in the original declaration, you have reference to two payments, one of $130,000 to LTC and the next paragraph you've got $56,000 being paid by Professional. That only gives us a total of $186,000.

In your second supplemental you've got a total of $265,000. Why the difference?

THE WITNESS: The second supplemental for CW4?

THE COURT: Page 3, paragraph 7. If you look at page 14, also dealing with CW4, different numbers.

[57] THE WITNESS: When CW4 identifies ten patients for $265,000?

THE COURT: Yes.

THE WITNESS: The original declaration, that's what the bank records reflect, how much money he received from these two companies.

THE COURT: The difference is cash?

THE WITNESS: In the second one, it's what was billed for these patients of his by Medicare.

THE COURT: All right.

BY MR. SREBNICK:

Q. CW number 5, also a cooperator, indicted for other healthcare fraud activity?

A. Yes.

Q. Also entered into a plea agreement and also trying to reduce her exposure in terms of sentencing?

A. Yes.

Q. Did CW number 5 ever testify under oath?

A. Not to my knowledge.

Q. Same question for CW number 4. I forgot to ask you that.

A. No, not to my knowledge.

Q. So CW number 5, I have the reports that were produced, the redacted reports. Again, I don't have the patients, but according to your declaration, you are connecting CW number 5 to 50 patients, which I think is the largest number of all the [58] CWs, for a total of $2,122,893.96?

A. Yes.

Q. From reading the redacted reports, at least the way it appears in these redactions, which I confess I can't be certain because of the blackout, but it appears that CW number 5 claims that she was approached about a kickback scheme, but declined to do it.

A. Yes, she was approached by Sila Luis to recruit patients and to sign—have her doctor signed POCs.

Q. And CW number 5 claims that she, CW5, declined to do that, right?

A. Yes.

Q. Let's put this in context.

These interviews of CW5, are they occurring at the Federal Detention Center?

A. Yes.

Q. It appears to me, from the documents I was given, that CW5 was debriefed back in 2011, December 15th of 2011 at the Federal Detention Center, but it doesn't appear you attended that interview. It says the interview was by Special Agent Rolando Alvarez and a Susan Shimpenosis [phonetic]?

A. Yes.

Q. Do you know those two agents?

A. Yes.

Q. Have you had a chance to look at their report?

[59] A. Yes.

Q. Since it's redacted so much, I can't be sure, but it appears to me that when interviewed back in December of 2011 at the Federal Detention Center, I just don't see a reference to Sila Luis, although I do see a reference to LTC.

If I could approach to show you this. That's the only report I have of the interview of CW number 5 before Ms. Luis is arrested, I believe.

Strike that.

Let me let you review it, and then I'll correct that.

A. Yes.

Q. So the report you have is from 2011?

A. Yes.

Q. In 2011, did CW number 5 implicate Sila Luis by name, or in any way, other than mentioning LTC as an entity she had some contact with?

A. She advised that she went to go see the owner of LTC.

Q. Did she say who that was?

A. Not in this report.

Q. Could you look around to see if there's any other reference. I couldn't find it because there are so many redactions.

A. I believe she just says "the owner".

Q. Thank you. If you could see if you can figure out what the accusation is from that report, because I can't tell with all [60] the redactions. What is the accusation that CW5 is making regarding LTC in that report?

MS. TORRES: Your Honor, objection. The witness testified that he did not write this report and was not at that interview. I think he can testify generally to his knowledge of this—

THE COURT: The only thing he can testify to is his understanding.

BY MR. SREBNICK:

Q. Do you have an understanding of what CW5, back in 2011, was accusing LTC of doing?

A. CW5 went to the owner of LTC and discussed referring patients for kickbacks.

Q. Can you just put a blue mark where it says that so I can follow.

Okay, what about the previous paragraph?

A. This one?

Q. Yes.

A. Yes.

Q. Do you have an understanding of what the accusation is regarding LTC beyond what you first told us?

A. Yes.

Q. What is that?

A. At this particular clinic, CW5 saw the doctor at the clinic signing stacks of POCs for LTC without seeing the patients.

[61] Q. So CW5 claims she observed a doctor at a clinic signing POCs, plans of care, for LTC patients who the doctor did not physically see in front of him at that time?

A. Yes.

THE COURT: Can you tell me where that's set forth in the declaration.

THE WITNESS: I don't believe that's in the declaration.

THE COURT: I'm trying to figure out exactly what is being alleged here in paragraphs 48 through 51. Maybe I'm missing something, which may be the case.

It says that CW5 met with the defendant, and it offered the defendant kickbacks for referring patients. Then it

concludes that that offer was declined and suggests that no kickbacks were paid for those, right?

THE WITNESS: Correct.

THE COURT: The same thing seems to be true for the next paragraph, paragraph 50, except they want doctors to sign false plans of care in exchange for $500,000. That offer was declined.

THE WITNESS: Yes.

THE COURT: What is it that CW5 is testifying to with regard to kickbacks.

THE WITNESS: She's testifying that a patient recruiter for LTC brought their group of patients to her clinic [62] to become qualified for home healthcare, and CW5 observed these patients and had a relationship with that recruiter.

THE COURT: I must be missing something.

49, CW5 met with the defendant. The defendant offered to pay CW5 money in exchange for CW5 referring patients to defendant's clinic, right?

THE WITNESS: Yes.

THE COURT: That offer was declined?

THE WITNESS: Yes.

THE COURT: So nothing happens then, right?

THE WITNESS: Correct.

THE COURT: Although it may be evidence of showing knowledge or intent.

Same with regard to paragraph 50.

I can't figure out how that equates to $2 million plus in claims being submitted for 50 patients. I just don't follow it.

THE WITNESS: 51, the patient recruiter that she had the relationship with—

THE COURT: Don't use the pronoun. First of all, we're not dealing with proper names to begin with, so use at least designations.

THE WITNESS: CW5 had a relationship with an LTC patient recruiter who brought his group of patients to CW5's clinic to become qualified by CW5's doctor.

[63] THE COURT: Where does it say that?

THE WITNESS: Paragraph 51.

THE COURT: What you're saying is, based on what the recruiter told CW5—it's a double hearsay we're talking about.

THE WITNESS: CW5 verified those patients and observed those patients, made observations regarding those patients' medical necessity.

THE COURT: Thank you.

BY MR. SREBNICK:

Q. So paragraph 51 is your understanding of what CW5 says an unidentified patient recruiter says was the relationship between the recruiter and LTC?

A. Yes, and CW3 and 9 corroborate that this recruiter was a recruiter—

Q. I can't hear you.

A. CW3 and 9 corroborate that this patient recruiter was a recruiter for LTC.

Q. When you say CW3 corroborates it, is that the same recruiter that you had discussed earlier in the context of CW3 when we were talking about an unnamed recruiter?

A. No, a different one.

Q. CW3 identifies a second unnamed recruiter as having a relationship with LTC?

A. Having a relationship with the doctor at CW5's clinic.

[64] Q. Now, you said that CW9 also indicates that this recruiter, unnamed recruiter, had a relationship with some sort of claims of kickbacks with LTC?

A. Yes.

Q. Was CW9 the one who paid kickbacks to this recruiter that CW5 is identifying in paragraph 51?

A. I don't know.

Q. With regard to CW5, who according to your declaration is the owner of a medical clinic, CW5, as you discussed with the Judge, says that CW5 did not participate in any kickback scheme with LTC or Sila Luis, correct?

A. Right.

Q. But CW5 is then providing some hearsay information to you regarding another recruiter and 50 unnamed patients, right?

A. Correct, because CW5, those patients went to CW5's doctor.

Q. Got it.

This recruiter identified by CW5, is he or she cooperating with the government?

A. Not at this time.

Q. Has this recruiter spoken to the government?

A. Not at this time.

Q. Has this recruiter been indicted?

A. No.

Q. I was asking you earlier, the interview from 2011 of CW number 5, that interview is the one in which CW5 describes that [65] CW5 went to see the owner of LTC. At that time, did CW5 identify Sila Luis as that owner?

A. I don't believe in that report, no.

Q. Do you know if CW5 had identified Sila Luis at all in 2011?

A. I believe in subsequent interviews.

Q. In 2011, was CW5 unable to identify Sila Luis as the person who CW5 had met with on behalf of LTC?

A. I don't think the agents asked specifically, because that was not the focus of their investigation at the time.

Q. Did CW5 indicate that there was another owner of LTC that CW5 had a relationship with?

A. That CW5? Say that again.

Q. CW5 identified a different person as also being an owner of LTC, right?

MS. TORRES: Objection, can we clarify what time period we're talking about.

BY MR. SREBNICK:

Q. I'm trying to find out. I don't have all the information.

Did CW5 identify a second person as being an owner of LTC, someone other than Sila Luis?

A. Possibly. I would have to look at the report briefly. I don't remember.

Q. So in 2011, CW number 5 doesn't identify which owner he or she is referring to, correct? Just an owner of LTC, correct?

A. Correct.

[66]

Q. Then in 2012, in September, is when you participated in an interview of CW5 for the first time?

A. What date was it?

Q. September of 2012. Does that sound about right? September 13th, 2012.

A. That sounds about right. You have all the interview reports, so.

Q. She was in custody at that time, or was she out on the street?

A. In custody.

Q. Now, this is a person, CW5, that was indicted for participating in healthcare fraud and kickbacks and all sorts of stuff apart from LTC, right?

A. Yes.

Q. This is a person who, apparently, had no moral objection to doing that type of activity, correct?

A. She engaged in it, yes.

Q. Her claim to you was, while sitting at the Federal Detention Center, in order to somehow provide some information about Ms. Luis, claims that Luis wants to discuss the kickback scheme, CW5 declines it, even though CW5 is someone who was happy to do it in other instances, right?

A. At that point, I believe CW5 wanted to try to stay out of it, but ultimately engaged in her kickback scheme and the fraud.

[67]

Q. Was it credible to you that CW5, who was involved in healthcare fraud, is claiming that she was declining the opportunity to be involved in healthcare fraud when

supposedly approached by Sila Luis? Was that credible to you?

A. Yes, it's possible.

Q. Possible or credible? Anything is possible.

A. I believe it's possible. If she wanted to lie to us, she would have said that yes, that happened.

Q. It didn't happen. We know it didn't happen, right

A. Correct.

Q. But she's claiming that it was proposed to her so she can implicate Sila Luis, right?

A. That's what she said.

Q. Right. So she claims it was offered, but she claims it didn't happen; isn't that right with regard to CW5?

A. Yes.

Q. Then she claims that she heard from a recruiter that the recruiter had a kickback arrangement with LTC?

A. She was friends with that recruiter.

Q. At the end of the day, it's really CW5 providing hearsay about an unnamed recruiter?

MS. TORRES: Objection, Your Honor, I think we covered this question previously. The agent has answered it.

THE COURT: I think so.

Are you going to leave CW5 now?

[68]

MR. SREBNICK: Yes.

THE COURT: Before you do, I need some help here. In your original affidavit, you referred to CW5, but you didn't quantify the amount.

In paragraph 8 of your second supplemental declaration, you say that CW5 identified 50 patients. How was that done?

THE WITNESS: She was shown two separate lists of her doctor that she worked with at her clinic, and she identified those patients as this particular patient recruiter's patients, who were all brought to her clinic.

THE COURT: How did she identify those 50 as the group or cubby of patients that were going around for this recruiter?

THE WITNESS: She knew all the patients that came through her clinic. She recognized their names as that particular patient recruiter's patients.

THE COURT: Did CW5 identify it that way, that these 50 I can pick out because I know their names and they also were for LTC? I'm just confused because she turned down all these offers sometime previously to that. Then all of a sudden she's identifying patients.

THE WITNESS: She's identifying that recruiter's patients that she had that was her friend.

THE COURT: Then you went to the claims and matched up those 50 patients with claims that came to $2.1 million?

[69]

THE WITNESS: Yes.

THE COURT: All right. Mr. Srebnick?

BY MR. SREBNICK:

Q. I'd like to ask you now some questions about CW number 6. According to your declaration, it's 16 patients with Medicare collections of approximately $505,000?

A. Yes.

Q. CW6 is also a cooperating witness with an indictment for other criminal activity apart from the allegations in the LTC Professional case, right?

A. Yes.

Q. So CW6 has all the same motives and credibility issues as with any other cooperators we previously discussed, right?

A. Yes.

Q. Did CW6 testify under oath, to your knowledge?

A. Not to my knowledge, no.

Q. CW number 6 was a nurse?

A. Yes, and a recruiter.

Q. In CW6's capacity as a nurse, he or she—start over.

CW6, in his capacity as a nurse, was employed by LTC and Professional or just LTC?

A. A nurse at LTC and recruiter at Professional.

Q. Did CW6 provide any nursing services for patients at Professional?

A. Yes.

[70]

Q. Yes?

A. Yes.

Q. All right. So CW6 provided nursing services, was employed by LTC and Professional, right?

A. Yes.

Q. Now, CW5 was asked to identify people in a photograph. Do you remember that? And do you recall CW5 misidentifying Ms. Luis's husband as somebody else?

A. Yes.

Q. So without discussing names, do you recall that CW5 was—let me ask the government.

MS. TORRES: Aren't we talking about CW6?

MR. SREBNICK: Forgive me, I meant all of these questions, the last five or six questions, for CW6.

THE WITNESS: Yes.

BY MR. SREBNICK:

Q. With regard to CW6, cooperator, plea agreement, indicted, credibility issues, correct?

A. Yes.

Q. With regard to CW6, employed at LTC and Professional as a nurse through 2009, right?

A. And a recruiter, yes.

Q. CW6 misidentified Ms. Luis's husband as another person by the name of Salinas, right?

A. Yes.

[71] Q. CW number 6 told you that Salinas would pay kickbacks at a particular gas station on Northwest 138th Street and 67th Avenue, and was then shown pictures, misidentified Salinas by putting a finger on Mr. Luis's husband instead, right?

A. Yes, he misidentified—he clarified that later. He always called him by the name of Salinas. At the time, we didn't know that there was another partner at Professional named Salinas, so we put the two and two together and knew that he was talking about a man named Salinas.

Q. Let's be clear.

CW6 was telling you that there was somebody at Professional named Salinas, right?

A. Yes.

Q. Salinas, you determined, was a real person, right?

A. Yes.

Q. Salinas is not Ms. Luis's husband, correct?

A. No, correct.

Q. After CW6 goes on about how Salinas was the one involved in giving kickbacks, CW6, when shown a photograph, identified Ms. Luis's husband as this person Salinas, right?

MS. TORRES: Objection, Your Honor. There's no allegation in this case regarding Ms. Luis's husband. So I'm not sure what the relevance is of these questions.

THE COURT: Overruled.

Did you answer that question? I'm not sure people [72] heard it because there were other people talking. Did you answer the question?

THE WITNESS: Yes.

THE COURT: I thought so.

Let me jump in quickly. In paragraph 54 you say CW6 met with the owner. Is that the Salinas that we have been referring to?

THE WITNESS: Yes.

THE COURT: I have a question. Who is Salinas? Is he an unindicted co-conspirator?

MS. TORRES: Your Honor, I think the agent can explain the relationship. I believe he was, for a period of time, a co-owner of one of the agencies.

THE COURT: That's not my question. Is he an unindicted co-conspirator?

MS. TORRES: I'm not sure, Your Honor.

THE COURT: I assume you're asking me to attribute what Mr. Salinas said to CW6, as set forth in these various paragraphs, to the conspiracy.

MS. TORRES: CW6 talks about recruiting patients to one of the agencies at issue, Professional Home Care. Having had conversations with both Co-defendant Myriam Acevedo and this other owner, Mr. Salinas, regarding those payments, those kickbacks for those patients for that agency.

THE COURT: Why is a conversation with Salinas [73] relevant?

MS. TORRES: Well—

THE COURT: Let me finish my question. If he's not a co-conspirator?

MS. TORRES: Well, he was involved in the scheme, Your Honor, yes. He was one of the owners for a short period of time.

THE COURT: Well, if he's not a co-conspirator, how would this ever be relevant?

MS. TORRES: Your Honor, perhaps I'm misunderstanding the Court's question. He was involved in the scheme—

THE COURT: When you say involved with the scheme, what does that mean?

MS. TORRES: That he discussed the kickback payments with CW6.

THE COURT: Okay. But you haven't told me that he's a co-conspirator, so how can his statement come into evidence? I know we're not going in accordance with the rules of evidence strictly, but there's got to be some tie-in with Salinas to the conspiracy.

MS. TORRES: Well, he was part of the conspiracy. I apologize if I misspoke earlier. He and Myriam Acevedo were both involved with the agency Professional Home

Care, had conversations with CW6 about the payment of kickbacks.

THE COURT: Okay.

[74]

BY MR. SREBNICK:

Q. Did CW6 have any contact with Sila Luis?

A. CW6 arranged a meeting between Myriam Acevedo, Sila Luis, and a patient recruiter that he was the nurse for the patients that he saw.

THE COURT: Could you elaborate on that. That's not in your declaration, is it?

THE WITNESS: I don't believe so.

THE COURT: Can you kind of put that in context of what was going on.

THE WITNESS: Sure. CW6 was a nurse for a group of patients for a particular recruiter. That recruiter wanted to get into LTC. So CW6, who was already working at LTC, contacted Myriam Acevedo to arrange a meeting between the recruiter, Sila Luis, and Myriam to discuss bringing patients to LTC for kickbacks.

THE COURT: Okay.

BY MR. SREBNICK:

Q. I'd like to now ask you some questions about CW number 7.

According to your declaration, CW number 7 identified three patients for a total of $113,646.81?

A. Yes.

Q. CW7, another witness with similar motives and credibility issues like the prior CWs?

A. Yes.

[75]

Q. Any testimony under oath by CW number 7?

A. I don't believe so, not to my knowledge.

Q. Isn't it true that CW number 7 never met with Sila Luis?

A. Not directly. CW7 went to LTC where another patient recruiter that he was involved with met with Sila. So he went to the meeting. He just didn't participate. The other recruiter participated.

THE COURT: Could you go through that one more time for me.

THE WITNESS: Sure. This recruiter—

THE COURT: CW7.

THE WITNESS: CW7, he was approached by another recruiter and wanted to—that recruiter was going to get his two patients into LTC. So therefore, they went to go have a meeting with Sila. He didn't participate in that meeting.

THE COURT: Who?

THE WITNESS: CW7 and this other patient recruiter.

THE COURT: Went to meet with Sila. You're talking about the defendant?

THE WITNESS: The defendant, yes.

THE COURT: Did he observe the meeting?

THE WITNESS: Yes, out here in—the other patient recruiter conducted the meeting with Sila, discussed the kickback rates, and then went and told CW7, yes, this is the rate.

[76]

BY MR. SREBNICK:

Q. It's not clear to me. Was CW number 7 present for that conversation between this unnamed recruiter and Sila Luis?

A. He was there, but he was not present for the conversation because the other recruiter had the relationship with Sila.

Q. So the information that CW7 has now shared with the government is a report by CW7 of what this recruiter told CW7 happened in that meeting?

A. Yes, he physically went to LTC, but he wasn't physically present for that meeting.

Q. He didn't hear the conversation in realtime, correct?

A. Yes, it was the other patient recruiter who had that meeting because Sila was friends with the other patient recruiter.

THE COURT: He basically arranged the meeting and was not involved in the meeting?

THE WITNESS: The other recruiter arranged the meeting for him.

THE COURT: CW7 arranged a meeting with another recruiter to meet with the defendant, Ms. Luis?

THE WITNESS: The other recruiter arranged the meeting with the defendant on CW7's behalf.

THE COURT: The conversation about recruiting and payments was between whom?

THE WITNESS: Between the other recruiter and the [77] defendant.

BY MR. SREBNICK:

Q. Bottom line, CW7 is reporting back to you what CW7 was told by the recruiter had been discussed in a

meeting that CW7 did not himself hear in realtime, correct?

A. Correct, and then ultimately, he was paid kickbacks for those two patients.

Q. Who paid the kickbacks? Who physically gave him the money?

A. The other recruiter.

Q. The recruiter did?

A. Yes.

Q. Is this a different recruiter than the two you mentioned earlier in our conversation today?

A. No, it's one of the same ones as previous.

Q. Is this the one that was related to CW number?

A. 2, and CW number 1.

Q. I'd like to ask you about CW number 8.

According to your declaration, CW8 identifies one patient as having been involved in a kickback scheme, right?

A. Yes.

Q. According to CW8, CW8 had a relationship with Elsa Ruiz, as indicated in your declaration, correct?

A. Yes.

Q. Any contact with Sila Luis?

A. No, she knew she was the owner, but no, the contact was [78] with Elsa.

Q. CW8, was it a he or a she? Does it matter?

A. She.

Q. Is she somebody who was either indicted or facing charges?

A. Yes.

Q. Does she have a plea agreement?

A. Yes. But at the time we spoke with her regarding this, she had already served her time.

Q. Had she cooperated beforehand?

A. Yes, on a previous matter.

Q. Had she identified LTC in prior debriefings, because I don't have those reports?

A. Not to my knowledge. It never came up.

Q. What benefit, if any, was CW8 receiving in exchange for this debriefing in 2012 in which she implicated Elsa Ruiz? Any benefits?

A. None.

Q. She had already served her sentence?

A. Yes.

Q. Was she on probation, supervised release?

A. Yes, she was on probation.

Q. Did she receive any benefits, do you know, for providing this information regarding Elsa Ruiz?

A. Not for this case. She received a benefit for a previous case.

[79] Q. I don't have any idea who it is, so that's all the questions I have about CW number 8.

Let me just ask this globally. Is it fair to say that none of the interviews that you have now reported to the Court of the eight CWs, none of them were under oath, correct?

A. No, we don't conduct interviews under oath.

Q. So correct, none of them were under oath?

A. Correct.

Q. Now, apart from the cooperating witnesses and the allegations against LTC and Professional regarding

billings of Medicare, you now have access to the records of LTC and Professional. They're over at the Miramar facility that is housing the documents?

A. Yes.

Q. You also had access to the computers of LTC and Professional that were seized as part of the search and arrest in this case?

A. Yes.

Q. You've had access to bank records regarding the banking activities of these entities?

A. Yes.

Q. Have you had a chance to review any records to confirm, for example, that LTC and Professional had other sources of business and revenue apart from billing Medicare?

A. They had Medicaid billings.

[80]

Q. Are you familiar with other entities like Ever Care, Sunshine State, Vista, Providence, et cetera?

A. I'm familiar with Ever Care, yes.

Q. Have you done an analysis of how much revenue was generated by LTC and Professional from sources other than billing Medicare?

MS. TORRES: Your Honor, we'll raise an objection to this line of questioning, which is directed at what amount of funds were traceable to Medicare and which were not. An issue that we discussed earlier.

THE COURT: Why are we doing that? We have a provision in the statute that says substitute assets.

MR. SREBNICK: Perhaps when we discuss it, I want to make sure I have an adequate record. At an appropriate

time, we can take it up then if you prefer to do that. Do you want me to hold off?

THE COURT: No, go ahead and ask the questions you need.

BY MR. SREBNICK:

Q. Do you know what Quickbooks is, the accounting software?

A. Yes.

Q. Have you had a chance to look at or generate reports using the Quickbooks of the company or looking at the bank records of LTC and Professional to determine how much other revenues came in that were not from Medicare billings?

[81]

A. Our financial analyst has reviewed the records.

Q. Fair to say it's more than $10 million for the two entities?

A. I know it's in the millions. I can't remember exactly.

Q. Fair enough. I have the records so we can do it through another witness to be more specific, but the government has done that analysis, and it's clearly within the many millions of dollars, right?

A. Yes, and we're still continuing to do the analysis.

Q. I'd like to ask you some questions about your declaration regarding Medicare revenue going into various accounts belonging to LTC Professional and/or the defendant, correct?

A. Okay.

Q. In your declaration, and I think it's the first supplemental declaration, and that's docket entry 66.

Docket entry 66-1, page 4, paragraph 6. It indicates that the United States has been able to trace Medicare proceeds going into every bank account owned by Defendant Luis and/or her companies, et cetera. Do you see that?

A. Yes.

Q. You don't mean to say that only Medicare proceeds went into those accounts, correct?

A. There are some accounts where other deposits were made, yes.

Q. But that tracing hasn't been done in your declarations, [82] right?

A. Correct.

Q. With regard to the properties listed at paragraph 7 on that same page, when you say you've been able to trace Medicare proceeds, that means at least $1 or some amount of money from an account that had received Medicare can be connected to the property either through a maintenance payment, a tax payment, some payment in connection with that piece of real estate, right?

A. Correct.

Q. Again, that doesn't exclude that other revenues, non-Medicare revenues, also contributed to those pieces of real estate, correct?

A. Yes, it's possible, yes.

Q. With regard to the jewelry that was seized in the case, I think that's at paragraph 5. It's page 3 of your declaration, docket entry 66-1. There is an estimate of approximately $250,000 worth of jewelry that was found and seized by the government, correct?

A. Yes.

Q. Have you traced the acquisition of that jewelry to Medicare proceeds?

A. No, a lot of money was taken out in cash from the defendant's bank accounts. You can't trace cash.

Q. At least at the present time, you have not traced Medicare [83] dollars to the acquisition of the jewelry, correct?

A. That tracing is still ongoing, but we haven't seen any significant amounts going to—for the jewelry.

Q. I'd like to ask you about the properties in Mexico that the defendant herself notified the government about.

There are multiple properties that are owned by the defendant either in her own name or through a corporation. Has the government been able to trace Medicare dollars going to the acquisition of the real estate in Mexico?

A. We have shown Medicare money going to the defendant's corporation in Mexico. We've been able to show maintenance payments on condo buildings in Mexico.

Q. Have you done an analysis—because there are multiple properties in Mexico. Have you done a specific analysis as to each of, I think it's four pieces of real estate in Mexico?

A. Our analysis is still ongoing. We are still awaiting certain wire transfers from the banks.

Q. Okay. But as of today, and I'm not precluding that you're going to continue to do it, as of today, do you have anything to offer us in terms of tracing Medicare dollars to the particular pieces of real estate in Mexico?

A. Yes.

Q. What do you have on that?

A. I believe it's a wire transfer for at least one of the properties as a, don't quote me, I want to say a down payment [84] in connection with the sale of one of the units.

Q. Is that something you could then tender to us after court today perhaps?

A. I would have to get with my financial analyst, but you have all the financial records that we have to date.

Q. Right, I have gigabytes and gigabytes. I'm trying to identify what it is that connects the four pieces of real estate, trace it back to a Medicare dollar. That's what I'm asking for. Do you understand?

A. Yes, we do have some items, yes.

Q. There are a few properties in this list at paragraph 7. Do you have that before you, docket entry 66-is, page 4?

A. Yes.

Q. Do you see that the last two items of property on that page are an address at Indian Creek Drive?

A. Yes.

Q. Have you seen the records that show that that property was acquired before 2006?

A. Yes.

Q. Can we agree that 2925 Indian Creek Drive, Unit 316, as well as 2925 Indian Creek Drive, Unit 320, were both acquired prior to the dates of the conspiracy?

A. Yes, but taxes were paid with accounts which Medicare money flowed through.

Q. Got it. But the acquisition of those properties, you know [85] that they were paid for in full. There was no mortgage on the property?

A. I believe so, yes.

Q. So we'll address maintenance payments, et cetera, but in terms of the acquisition of the property, it was acquired with money not connected to indictment offenses, correct?

A. It was before the conspiracy period.

Q. There's a property that we know as the Blue Diamond, which is 4779 Collins Avenue?

A. Yes.

Q. Have you done a tracing of that property, of how it was acquired?

A. We showed payments by accounts—or a payment for the closing of that condo, I believe.

Q. The closing of that property occurred July 20th of 2010; does that sound right to you?

A. I don't know off the top of my head.

Q. Let me show you what I'm going to mark as Composite Exhibit 1.

THE COURT: We're going to take a break in five minutes.

BY MR. SREBNICK:

Q. Here is Composite Exhibit 1.

THE COURT: Is that a different subject-matter?

MR. SREBNICK: Yes.

[86]

THE COURT: Why don't we take a break now. We'll talk about our scheduling right now. You can step down.

We need to talk scheduling for a moment. How much time do you think you are going to be with this witness?

MR. SREBNICK: Well, it depends on how much detail Your Honor wants. If all I'm trying to establish, and maybe I can reach a stipulation over the lunch break with the

government—in fairness to them, it's a lot of information, but I think if we can reach a stipulation over lunch, we can avoid this entire inquiry.

All I'm trying to prove is that there were non-Medicare dollars that contributed to the acquisition of these various properties. There may well also have been Medicare dollars depending on what accounting methodology used. So that I can preserve—

THE COURT: Why don't you enter that stipulation. Based on the wording of 1345, substitute properties are assets, are just as good as tainted assets. That's my view. Maybe a stipulation in that regard might be useful to everybody.

MR. SREBNICK: If we do that, I don't think I have much more, five or ten minutes, but that's really what I needed to establish.

THE COURT: Does the government have any witnesses?

MS. TORRES: No, Your Honor, we do not.

THE COURT: Do you have a witness?

[87]

MR. SREBNICK: Depending on the stipulation issue, I do have a summary witness on these transactions.

MS. TORRES: Your Honor, I would like to ask some questions of the agent on redirect.

THE COURT: I asked for proposed findings of fact and conclusion of law, but I didn't get them.

MS. TORRES: The government filed them late yesterday, Your Honor.

MR. SREBNICK: You did not get any from us. We notified chambers that in light of the disclosure of all of the redacted reports—

THE COURT: I probably have to get both sides. You may have to amend yours a little bit based on what we heard here.

Taking a closer look at the law, it seems to me that this case could be resolved on the indictment. Is that the government's position?

MS. TORRES: Yes, Your Honor, on probable cause of the criminal conduct and the amount.

THE COURT: Yeah, that's what I'm thinking. The only reason the Eleventh Circuit said there was a necessity for a hearing was to show the nexus between the criminal activity and the assets that were frozen.

Under the statute we're proceeding under, there is no requirement of the same because substitute properties are just [88] as good as tainted properties. At least that's my view.

The indictment has come out charging the three defendants with healthcare fraud and conspiracy, various types, one of which is Count 1, which I think is all inclusive, but maybe doesn't include payments to recruiters.

Count 1 only deals with either providing medical attention that was not necessary or not providing it at all. Is that the sum and substance of Count 1?

MR. SREBNICK: I think it also includes kickbacks.

MS. TORRES: Your Honor, there's a conspiracy count to pay kickbacks and medically unnecessary services, and then there's substantive charges for the payment of kickbacks.

THE COURT: Let's see. Count 1 is entitled "Conspiracy to commit healthcare fraud"

MS. TORRES: If Your Honor looks at paragraph 8—

THE COURT: I'm looking at 3B. It says, "The purpose of the conspiracy was the submission of false or fraudulent claims, and B, offering or paying kickbacks."

Okay. But the next one is also a conspiracy claim. Count 2 is a conspiracy claim to pay healthcare kickbacks under a different statute.

So you've got—by the way, that does not quantify the amount. Count 1 does. But it seems to me that if I'm reading the statute correctly, and I think I am, that there is no need to have this hearing we're having, quite frankly, [89] because substituted assets are as freezable as tainted assets.

In the indictment, we have, in my view, a finding based on probable cause of various types of Medicare fraud, including kickbacks and also submission of false and fraudulent claims, payments in excess of $70,000, and submission of approximately $74 million rather in false and fraudulent claims, which result in payment of $45 million.

Why do I need anything more than that? Think about that, and when we come back, we'll talk about that. See if you can get your stipulation. It seems to me that that should be a stipulation that you can resolve, particularly due to the fact that I feel that substituted assets apply in this case.

If you just want to make your record, Mr. Srebnick, I think that should be done.

I'm sorry, I'm having a tough time talking. I'm taking some kind of muscle relaxants, and it's dried my mouth up. I'm having a tough time talking. I feel like I've got cotton in my month. We'll return 20 after. We will see you at 1:20.

[There was a recess for the noon hour].

THE COURT: All right, where is everybody?

MR. SREBNICK: The government is coming in right behind us, Your Honor.

THE COURT: All right. Is everybody ready to proceed?

MR. SREBNICK: Yes. In order to streamline the [90] proceedings, the parties have attempted to reach a stipulation we hope the Court will accept.

The parties are prepared to stipulate, for purpose of this hearing alone, that an unquantified amount of revenue not connected to the indictment flowed into some of the accounts and some of the real estate that is currently subject to the temporary restraining order.

Accordingly, as a result, the government agrees that the defendant has made a sufficient showing that the TRO may currently be restraining substitute assets that would otherwise be available to retain counsel of choice.

THE COURT: Agreed?

MS. TORRES: That was our agreement, Your Honor, yes.

THE COURT: Okay.

MR. SREBNICK: With that understanding, Judge, I will not need to go property by property or account by account, and that's going to save us quite a bit of time.

THE COURT: Right.

MR. SREBNICK: What I would like to do, if I could have a moment, I would like to offer without objection, but subject to the government double checking the work product, what I'm going to refer to as Composite Exhibit Number 2. It is the printout from Quickbooks. Quickbooks.

What it appears to demonstrate is that those revenue sources that are the subject of the stipulation, with regard

to [91] LTC, there were revenues of $15,024,932.97 from sources not subject of the indictment.

THE COURT: 15 million?

MR. SREBNICK: Yes, 15 million plus.

MS. TORRES: Your Honor, I would just note for the record that we received that report late last night. We have not been able to look at it. While I agree it can come in for the purpose of showing other revenues, the government would like the opportunity, if appropriate in the future, to contest the numbers or other aspects of the report that we have not yet been able to analyze.

MR. SREBNICK: Understood, Your Honor.

This printout came from the computers that were seized by the government. If the government runs into any issue, we have no objection to them bringing that to everybody's attention. That's Composite Exhibit 2.

To whom do I tender it, Judge?

THE COURT: What happened to Composite Exhibit 1?

MR. SREBNICK: That was the one that the witness was looking at regarding the condominium Blue Diamond, which is when we broke.

THE COURT: Are you offering that into evidence as well?

MR. SREBNICK: It's not necessary given the stipulation. So only composite Exhibit 2 is necessary.

[92] I would like to conclude my examination very briefly. It will take about five minutes with Agent Warren.

THE COURT: Take your time.

Agent Warren, please take the stand again, and I will remind you that you are still under oath.

BY MR. SREBNICK:

Q. Agent Warren, with regard to all nine confidential witnesses that are the subject of your declarations, did any one of them tell you that Sila Luis was involved in or knew that patients were being paid?

A. Well, CWs 9 and 4 dealt directly with Sila Luis regarding kickbacks that were going to be passed along to the patients. They had discussions.

Q. So CW number 9 and CW number 4?

A. Yes, and CW number 5 had discussions with Sila regarding kickbacks for patients. If you're going to pay a kickback, it's for the patient.

Q. That's what I was not clear on.

I understand, from what you told us so far, that there are recruiters who get paid to recruit patients, but I did not see anything in your reports or in your declaration that there was any discussion at all with Sila Luis that the recruiters would then share the money with the patients. I just didn't see that. That's why I was asking.

A. I don't know if there's a specific conversation, but during [93] these conversations regarding the kickbacks for patients, it's implied that the money is for the patient. The recruiter passes along the money to the patients.

CW number 9 advised that the money went to the recruiters, who would then pay their patients.

Q. Just to be clear, I understand that the recruiters and perhaps CW number 9 indicated that they, those recruiters, shared the so-called kickbacks with patients. I assume the recruiters kept money as well, right?

A. They kept a portion, and they passed along another portion to the patient. If the patients weren't paid, they would have never gone into LTC.

Q. Well, a patient can, if I'm mistaken you'll tell me if I'm wrong, a patient has different options of which agency to use for legitimate services. I assume there were patients you discovered in investigations who received genuine services that requested kickbacks. Have you seen those cases?

A. Well, a person who's receiving kickbacks is illegitimate in the first place.

Q. I understand they're, quote, "illegitimate" because there's a kickback involved, but that patient may well qualify under regulations or otherwise qualify to receive services that are medically necessary, right?

A. It's possible.

Q. So the patient, while qualified to receive services, [94] violates the law by taking a kickback to receive the service from a particular agency?

A. If you really needed the service, and you're going to go to a particular agency based upon them paying you X amount of dollars, do you really need that service?

Q. A diabetic patient who qualifies for services that can legally generate $10,000 in billings a month for the agency would violate the law if the patient demanded from the agency a kickback from that $10,000 that the agency was billing Medicare, right? That would violate the law, right?

A. Yes.

Q. The patient could qualify, but still request, and in fact demand, from the agency some kickback in order to allow the agency to be the one to provide the service, right?

A. It's possible.

Q. Have you seen that scenario in investigations before?

A. Where the patient legitimately needs the service?

Q. And then still asks for a piece of the action, so to speak?

A. I have seen that, yes.

Q. So, what I'm trying to close this out by understanding, do any of the reports indicate that any of the cooperating witnesses actually told you or the government agents you worked with that Sila Luis was told that the so-called kickbacks were actually going to patients?

A. I'm not sure if the conversation she had with these [95] recruiters, if they specifically told her that they were going to pass along some money to patients, but that's how these schemes operate.

Q. I understand how they generally operate, but in this case, limited to the interviews you and your colleagues conducted, did these cooperating witnesses report to you or your colleagues that Sila Luis was told that part of the kickback, so-called kickback, was going to the patients as opposed to one of the CWs or one of the recruiters?

A. Sila Luis, in regards to CW number 4, she laid out what the kickback rates were for a diabetic patient, for a physical therapy patient, for a monitoring patient, a blood pressure monitoring patient, so it's implied.

I don't know if they had that direct conversation, but they were going to pass along a portion to the patient.

Q. I guess what I'm confused about, the so-called kickbacks are based on a patient being recruited to LTC. The so-called kickback rates are on a per patient basis, right?

A. Yes.

Q. But that doesn't necessarily mean that the patient gets the money. It may well mean that the recruiter gets the money per patient, right?

A. In our investigation, cooperating witnesses have said that they paid the patients. If the patients weren't paid, they would have gone to another agency.

[96] Q. I understand that part of it. Last time I'm going to try to ask it.

Beyond what you just said, did the CWs actually tell you or your colleagues, actually tell you, documented in a report, that Sila Luis was told that part of the so-called kickback was going to the patient, him or herself, as opposed to just the recruiter?

A. I don't think the question was asked specifically like that to the cooperators.

Q. Understood. So then the answer is no, given the questions that you asked of the cooperators, correct?

A. I would say it's implied.

MR. SREBNICK: Judge, those were all the other questions that I had given the stipulation that we reached.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MS. TORRES:

Q. Good afternoon, Agent Warren.

You were asked a series of questions regarding whether certain of the cooperating witnesses spoke directly to the defendant. Do you remember those questions?

A. Yes.

Q. You said that some of them did not speak to her directly, correct?

A. That's correct.

[97]

Q. Can you describe to us, based on your investigation, what your understanding is of the defendant's role at LTC and Professional.

A. The defendant's role was owner and operator of LTC and Professional Home Care Solutions. She was the owner. She controlled the bank accounts. She received the most money. She was on the corporate records as being President. So she was the owner in this scheme.

Q. In addition to her ownership of the companies, what is your understanding, based on your investigation, of her role in the more day-to-day operations of the business?

A. Well, in the daily operations of the business, Sila dealt directly with Myriam and Elsa—

THE COURT: Can I interrupt for a second. Can you refer to the people in the last name, please.

THE WITNESS: Got you.

Can you repeat the question.

BY MS. TORRES:

Q. What is your understanding, based on your investigation, of her practical role at the agencies, in their operation?

A. Well, the defendant was the owner. Ruiz and Acevedo took orders from the defendant in operating the day-to-day operations at both companies.

The defendant directed CW number 9 to cash checks in order to pay patient recruiters. Sila—I'm sorry, the [98] defendant, I mean, she controlled the bank accounts, and in regards to the daily operations, she mainly compartmentalized herself to only deal with Acevedo and Ruiz and some of the office staff members.

Q. You mentioned CW9. In addition to CW9, have you gathered any other evidence indicating that the defendant had knowledge of the kickbacks that were paid to patient recruiters to obtain patients for her agency?

A. CW number 4 dealt directly with the defendant in the negotiation of kickbacks.

The defendant had conversations with CW number 5 regarding trying to receive recruited patients and the kickback rates.

Q. And CW9?

A. And CW number 9, yes.

Q. Can you explain the information that you gathered from CW9 on this issue.

A. Well, CW number 9 was directed by the defendant to pay certain patient recruiters and, again, to withdraw cash from the bank accounts. The checks would be written to Ruiz, which she would then cash, to pay these recruiters.

CW number 9 told us that the defendant had the relationships with the recruiters. So the defendant's recruiters at LTC were the same staff and recruiters over at Professional.

[99] Q. Now, you referred to cash payments. Have you reviewed the bank records in this case for the agencies?

A. Yes.

Q. What information have you gathered based on your review of those records?

A. It shows that the defendant received the most money, over $4.5 million in this scheme. It shows family members cashing checks all at the same time at or under $10,000.

CW number 9 told us this was done in order to generate cash in order to pay all of these recruiters. A

large sum of money, over $1 million from February of '06 through July of '09, over a million in cash was taken out from Sila Luis's bank accounts.

Q. What account was that? One account?

A. That was one main account, 0536, at SunTrust. Cash was taken out of other accounts as well, but we're still in the process of determining and finalizing how much was converted into cash. But just that one account, over $1 million was turned into cash.

Q. Who turned that $1 million into cash? Who withdrew that cash?

A. The defendant withdrew some of the cash. The defendant's family members would cash checks to help convert the money into cash. Acevedo and Ruiz would help convert the money into cash.

Q. Based on your experience investigating home health [100] agencies, what did those withdrawals indicate to you?

A. They indicated a large pull of cash in order to pay these recruiters. All the cooperating witnesses told us, except for one, that they were paid in cash. It corroborates that they needed to pull money out in cash in order to pay for these recruiters who brought them patients.

Q. You've been involved in the investigation of other home health agencies as well; is that correct?

A. Yes.

Q. Can you tell us, based on your experience investigating home health agencies engaged in this type of activity, what typically the relationship is between the owner of the agency and the patient recruiters?

A. Normally, the owner—

MR. SREBNICK: Objection, relevance.

THE COURT: Overruled.

THE WITNESS: Normally, the owners have a relationship with the patient recruiters because they need patients to bill Medicare for. The patient recruiters seek out these owners, establish relationships, because the owners need a patient pool in order to bill Medicare.

THE COURT: This is not something that's a surprise to me. We see it all the time. The testimony is not particularly relevant.

BY MS. TORRES:

[101]

Q. There's one additional question regarding the owner's relationship with the nurses in these types of agencies.

A. A lot of times, the owners don't have any relationship with the nurses. The schemes are set up like that. The nurses are over here, and the owner is way over here to the right. They are compartmentalized, and I think the scheme is designed that way.

Q. You were also asked a series of questions suggesting that the defendant may not have known about what was happening at these two agencies. Do you remember those questions?

A. Yes.

Q. What evidence have you gathered in this investigation regarding the defendant's control of her financial affairs?

A. Well, the defendant has opened and closed numerous bank accounts. Well over 40.

The defendant has a company in Mexico, transferred money over to Mexico, has property in Mexico.

The defendant is a savvy—she understands this business.

Q. Now, I believe you spoke a little bit earlier about who benefited from the scheme at these two agencies. The nurses and patient recruiters stood to gain money from the scheme, correct?

A. Yes.

Q. Who at these two agencies have you seen, through your [102] review of the bank records, benefited the most?

A. The defendant.

Q. Can you explain the amount that you've seen in the bank records.

A. The defendant received over $4.5 million from the scheme, at least.

Q. How about the defendants's family members?

A. A lot of them worked for LTC. They also received money. Her husband received over $1 million. Her daughter received approximately $500,000.

Q. Based on your review of the bank records and your investigation of this case, is there anyone associated with these two agencies who even came close to receiving the kind of benefits that the defendant received?

A. No, the defendant received, obviously, the most money in this scheme.

Q. Now, you were asked some questions about nursing notes prepared for these agencies. Do you remember those questions?

A. Yes.

Q. What is your understanding of how the nursing notes were to be prepared?

A. They were to be prepared by the nurses. LTC didn't want them being prepared inside their office. They wanted

to be able to put up a barrier. They just wanted the nurses to turn in the notes.

[103]

Q. What is that understanding based on?

A. Well, it's based upon some of the cooperating witnesses, what they've told us. This scheme is set up that way. The nurses falsify their notes. Their Quality Assurance Department, at least in this case, assisted with the falsification of the notes.

Ultimately, the agency is billing between $14,000 and $18,000 for 60 days for all of these diabetic patients.

Q. Now, you were asked some questions about CW number 4, who held himself out to be a home health aid. Do you remember those questions?

A. Yes.

Q. You were asked questions about whether CW4 had a corporation?

A. Yes.

Q. CW4 was paid checks to that corporation, correct?

A. Yes.

Q. Based on your experience in this investigation and in other home health agency investigations, is it typical to see corporations of this kind?

A. Yes, it's very common. A lot times, recruiters and nurses will start up companies in order to send their kickback money through—they thought that it would seem more legitimate.

Q. Now, you were also asked a series of questions regarding CW5 and the patients that the owner of the medical clinic, CW5, [104] identified. Do you remember those questions?

A. Yes.

Q. Can you explain again, who are the patients identified by CW5.

A. They are patients from a recruiter who worked with LTC, who brought his patients to CW5's clinic in order to receive home healthcare prescriptions.

Q. You know the identity of those 50 patients?

A. Yes.

Q. CW5 has identified those as the patients that were brought to her clinic?

A. Yes, she recognized those names.

Q. Now, you were also asked questions regarding several of the CWs. The questions were regarding the first time they provided information to the government and whether or not, during that first meeting or debriefing with the government, they mentioned LTC or the defendant. Do you remember those questions?

A. Yes.

Q. Can you explain the context of that first meeting with government.

A. That was with other agents investigating other companies. So those other agents would have elaborated on other companies that they were not interested in at the time.

Q. So those matters pertained to other investigations?

A. Correct.

[105] Q. Now, you've been involved in the investigation of the defendant from the beginning; is that correct?

A. Yes.

Q. Of the nine cooperating witnesses that we've discussed, they are addressed in your declarations, have

any of them stated to you or indicated to you that the patients came to these agencies legitimately?

A. No, not in my investigation, no.

Q. Now, you were also asked about all of the different cooperating witnesses, questions about whether they had something to gain by cooperating with the government. Do you remember those questions?

A. Yes.

Q. Can you tell us, based on your experience investigating home health agencies in the past, how the government pieces together what's been happening.

A. What do you mean?

Q. Well, can you tell us a little bit how you build your investigation in these kind of cases.

A. A lot of times we ask existing individuals who are cooperating in other matters—they've all worked for numerous other home health agencies, so we start piecing together and start seeing all these cooperating witnesses that worked for all of these companies. We've come up with a group of individuals who all happened to work at LTC and Professional as [106] well.

Q. Is it common in some of these other investigations to also rely on information provided by participants in the scheme?

A. It's very common.

MS. TORRES: Your Honor, can I have one moment?

THE COURT: You may.

MS. TORRES: Your Honor, I would ask a series of questions regarding asset tracing, but I believe that, based on the stipulation, we don't need to address those issues today.

THE COURT: All right.

MS. TORRES: No other questions. Thank you.

THE COURT: Any more witnesses?

MR. SREBNICK: May I ask anymore questions based on the redirect?

THE COURT: No. Direct, cross, redirect.

MS. TORRES: No other witnesses for the government, Your Honor.

THE COURT: You may step down.

[Witness was excused].

THE COURT: So the government rests in this mini-trial, so to speak?

MS. TORRES: Yes, Your Honor.

THE COURT: Mr. Srebnick, do you have any witnesses or other exhibits you want to offer?

MR. SREBNICK: Given the stipulation, I don't think [107] there's anything more I need to present on the tracing issue, so there's nothing else to present on that point.

If I may just have a moment?

THE COURT: Sure, take your time.

MR. SREBNICK: Given the parameters of the hearing, I have nothing further.

THE COURT: Okay. Let's take a recess and let me have the proposed findings of facts and conclusions of law that I spoke of earlier. You're probably going to have to refile them, government.

Here's my thinking on this, having looked at the cases before this hearing and seen what the evidence was, reviewing the indictment, it's my preliminary view that, unlike from the other cases, we have a situation here where

we may not even need to do the tracing to establish a nexus between the criminal activity and the fruits, the tainted assets that were generated by that criminal activity, because under 1345, not only the tainted goods are subject to a freeze, but also substitute assets or properties.

What I'm going to ask you to do is present brief argument on that point, and since we've gone through this hearing and produced a lot of evidence, I want to have a back-up position dealing with whether the government has shown that nexus.

The reason I want to do that is because I suspect [108] there will be, regardless of which way I rule, there will probably be an interlocutory appeal. So we might as well complete the whole process so that if it turns out that I overstated the import of substitute assets compared to the indictment, then I will have other positions set forth.

Then either I agree or disagree that the government provided that nexus evidence sufficiently. The standard, of course, and I'm repeating myself, is probable cause.

Now, do you want to do anything with regard to Ms. Luis's ability to pay for counsel other than the frozen assets, because that's the defendant's burden, as I understand it. Or we can postpone that if you want.

MR. SREBNICK: Well, I think those issues might depend on the Court's ruling as to the size of the restraint.

If the Court is ruling that it's $45 million, then I don't think there's any claim from the government that she has near that amount of money.

If the Court was going to restrain something closer to the amounts that are currently seized, then there might be an issue whether unrestrained assets are available.

For the time being, if the restraining order reaches $45 million, the government's analysis we heard today was that Ms. Luis only made $4.5 million, and perhaps another $1 million to family members.

To the extent that money is even still available, [109] which we believe it's not, that's a separate factual issue, it's nowhere near $45 million. One way to reach the point is for the Court to rule on what the size of the restraining order is and then, at that point—

THE COURT: That's fine. I leave it to you all to think about how long you need to put those memos together. Obviously, the sooner the better, but I don't want to put you under any undue stress.

What is your proposal of when you want to submit those? The proposed findings of facts and conclusions of law is what I'm referring to. How much time do you need?

MS. TORRES: We submitted one to the Court, so amending it won't take very long.

THE COURT: Not very long is like beauty in the eye of the beholder. Some say it may be three days. Some say three months. I really don't care. What works out for you?

MR. SREBNICK: I would request until a week from Friday, nine days.

THE COURT: Does that work for the government?

MS. TORRES: Yes, Your Honor.

Can I ask an additional question?

THE COURT: Sure.

MS. TORRES: The Court was just discussing the tracing issue and that it wanted to ensure that that was addressed in the proposed order. Did I understand that correctly?

[110] THE COURT: Yes. Let me give you my thinking. Based on the Kaley decision and all the other decisions I've read, the hearing was to determine whether the government could show a nexus, that is that there was a connection between criminal activity and the assets being frozen.

In Kaley, there was a totally different statute. There was nothing to indicate that anybody made the determination about the amount of fraudulent transactions, and when I read the Kaley decision, particularly Kaley Number 2, it strikes me that because 1345 doesn't distinguish between tainted and untainted assets, there's no reason to show a nexus. All you have to show is that there was a violation of the criminal act.

There were funds that were tainted by virtue of that, and that there were funds being held or that are already frozen, and that's it. Don't have to show that those funds were funds coming from Medicare, Medicaid, Blue Cross Blue Shield, whomever.

That's what Congress's intent was, to substitute those new assets so the defendant can't say, "Well, yes, I defrauded the government of $1 million. I spent that particular million dollars on watches and fancy cars, and all I have now is another $1 million, but that was from Blue Cross Blue Shield, not from Medicare."

It's pretty obvious to me that's what Congress [111] intended. So I think that's a preliminary determination on the matter. All we need is the indictment such that we have here, which has not only the criminal activity, but it gives us an upside in terms of $45 million.

I'm prepared to listen to your arguments and memos, which is essentially what your proposed findings of fact and conclusions of law is going to be.

I also want a back-up position in the event that I overstated or misunderstood the extent of some of those comments about the limited purpose for the hearing. Even though there has been a finding by the grand jury that there were criminal violations—

MR. SREBNICK: May I address the Court on that?

THE COURT: No, I'm waiting for him to stop talking. Even though there were criminal violations in that amount, that we still need to show some nexus. I just don't see what the purpose is, but I may be wrong.

So I want to have a fall back position so that I can then look at the evidence to see if there has been a nexus established for an amount in excess of the frozen funds, which is about $2 million.

Okay, go ahead.

MR. SREBNICK: I think what the parties can agree upon is that that's an extremely complicated process that involves a whole other area of the law with regard commingled assets.

[112] I gave the Court a citation at the last status conference, the Banco Cafetero case. We have not found any Eleventh Circuit case that teaches us how to do the accounting for the following reason.

To give a simple example, if one bank account receives Medicare money and receives Blue Cross money, to use the Court's example, if there's $1 million of Medicare money that's part of the indictment, and there's $1 million of Blue Cross money, and now there's $2 million in that account, if from that account $500,000 goes to purchase a piece of real estate, it begs the question is that piece of real estate traceable to the Medicare fraud?

If the answer is yes, what percentage? Was the $500,000 that went to that piece of property all Medicare? Was it all Blue Cross?

THE COURT: Let me stop you. Is there any case out there that says once they're commingled they become tainted unless the defendant can show an independent source? I don't know. I'm just asking the question. Let me jump ahead. So you prefer to put that issue aside?

MR. SREBNICK: I'm saying it's an extremely complicated issue, and it's going to require a lot of thinking and a lot of accounting.

THE COURT: Give me your proposed findings of facts and conclusions of law based on what I said is my preliminary [113] view, which is that, based on this particular indictment, what it does, nothing else is necessary.

The indictment itself establishes probable cause for the violation and for what I will determine as loss, or tainted claims payments, and then on a purely—looking at the indictment, whether it meets that standard.

The second would be, based on the evidence that's been presented today, was that same testimony sufficient to establish criminality and an amount in excess of what's presently frozen, which would be—I think that's what I am going to have to prove, given the substitute asset provision in 1345. So we won't get into tracing any assets. Does that make sense to everybody?

MR. SREBNICK: Yes. May I assume that our proposal would be what we would like the Court to rule upon versus what the Court has indicated it intends to rule upon?

THE COURT: I want to give you an opportunity to show me I'm wrong. We haven't really had a deep discussion about Judge Marcus's opinion and how he wrote

it, the Kaley opinion and other opinions, which all seem to be in context other than the one we have here where you have a statute that provides for the freezing of substitute assets.

They all go off to say that the defendant is entitled to some kind of hearing. They don't necessarily define what that is, but some hearing to establish a crime that generated [114] --whether there's a nexus between the two.

But it seems to me when you have the statute we're dealing with here, there's no need to meet that second step. Tell me why I'm wrong in that regard. The government will tell me why I'm right.

Also, based on the indictment itself, I'm going to see what the evidence is to support that same proposition based on the evidence that was presented here today.

MR. SREBNICK: Would the Court like me to identify now some of the legal issues that I think emanate from the hearing? That way we're not sort of passing ships in the night.

THE COURT: Sure.

MR. SREBNICK: One thing you heard today was that the forms that were signed by Sila Luis, we'll just accept for the purposes of discussion that Sila Luis is the author of these forms, docket entry 96-2, pages 1 through 17, all of them except one are dated prior to the conspiracy, meaning prior to 2006.

Only one was signed, but it was signed in 2012. Only one was signed after, in 2012, as to LTC at a time when LTC was no longer submitting claims to Medicare.

We believe that presents the issue under Medina whether the evidence that you've heard is sufficient to

constitute healthcare fraud as defined in Medina, given that none of the forms that were signed were signed at a time when [115] claims were being submitted to Medicare during a kickback period.

THE COURT: I thought that's where you were going. Isn't there evidence in the declarations that, with regard to signing the original application, a representation that the companies would comply with Medicare laws?

MR. SREBNICK: Yes, but under Medina and the Guerra defendant in Medina—and I have the language from Medina. I just want to flag it so everybody knows what we'll be arguing and be prepared to address it.

THE COURT: Wait a second. I have Medina here someplace.

MR. SREBNICK: It's at Medina pages 1297, 485 F.3d 1297 and 1298.

THE COURT: What's the page?

MR. SREBNICK: Pages 1297 through 1298. There's about three paragraphs.

THE COURT: Bracket number 5, the government argues the fact—

MR. SREBNICK: Yes, that's where I would begin. There are about three or four paragraphs there that seem to make this point.

THE COURT: Response?

MS. TORRES: Your Honor, my understanding of Medina is that after the defendant in that case signed the Medicare [116] application forms to enroll with Medicare and certify that she would—

THE COURT: That's my understanding too. That's what I think it says. I was very involved in that case, obviously. I'm trying to find where the evidence is in the

record when the two entities signed the original applications.

I believe every request for payment includes some certification, doesn't it, that this has been in compliance with Medicare laws?

MS. TORRES: I believe so, but the application itself doesn't end because it's not signed again every year.

THE COURT: I understand that. I'm saying I thought I saw that in one of the declarations. I think it was the very first declaration. Let me see if I can find it.

Paragraph 13 of the second supplemental declaration of Agent Warren.

MS. TORRES: Yes.

MR. SREBNICK: Those are the ones in evidence before Your Honor, and none of those were signed during the timeframe that Medicare was receiving billing requests from LTC or Professional.

THE COURT: Are you suggesting that a clinic can get a Medicare permit or license, sign the enrollment agreement, and for two years operate as a legitimate clinic, and then decide not to be legitimate and start paying kickbacks, and then you [117] have to do another enrollment agreement whereby you represent you have to comply with Medicare rules and regulations?

MR. SREBNICK: What I'm saying is that, under your scenario, Your Honor, that would violate the kickback provision, but under Medina, it would not violate 1347 because there must be a false statement being given to Medicare.

So the enrollment that predates the kickback scheme isn't sufficient. There needs to be some false statement

made by the defendant during the course of the kickback scheme.

In this case, on this record—

THE COURT: Wait a minute. I'm missing something. With regard to the kickback or the treatment that was not necessary?

MR. SREBNICK: For the fraud count under 1347. I think that's Count 1, one of the predicate offenses under Count 1. For it to be fraud based on kickbacks alone, it must be kickbacks plus a false statement, but aside from medically necessary, that's a separate fraud.

But if the government is relying just on a pure kickback scheme, it must be a kickback plus a false certification that the company is in compliance with all the Medicare regulations. That false statement must occur during the kickback scheme, not before. It has to occur during.

THE COURT: I don't think that's the law. I will wait for your argument. I'm not sure anybody has argued this, but I [118] thought, based on some case I had someplace in the last 13 years, that there was a certification required for each submission. Am I incorrect on that? You're the experts.

MS. TORRES: I think that's correct, Your Honor.

THE COURT: Don't you think you should put that in the record?

MS. TORRES: We will, Your Honor. We can provide the appropriate citation. In Medina, the Court held there that after that provider agreement and enrollment application was signed, every single kickback that came after that was tainted and constituted healthcare fraud. We believe that Medina supports our position here.

THE COURT: I think so too.

MR. SREBNICK: The government is right, except that in Medina, the kickback scheme had already begun when the defendants submitted the false statements of certification. That was the key to Medina.

THE COURT: I think you're reading that pretty narrowly.

MR. SREBNICK: Understood that the Court disagrees.

THE COURT: I think it's a little narrow. If nothing else, there's an implied representation. You say on day one that we're going to comply with all the rules and regulations, and on day five you submit your first false claim, I think it's clearly implied, if not expressly made, that that is in [119] compliance with the rules and regulations, because the enrollment certification is ongoing. It's a forward thing because you don't submit them until you're enrolled.

MR. SREBNICK: Forgive me. I'm assuming, on this record, there was no false statement at all between '05 and '12. Because the exact quote in Medina was based on testimony that Guerra was a patient recruiter, who paid patients to go to the pharmacy before she became a Medicare provider, a jury could have reasonably concluded that Guerra knew full well she would continue to pay kickbacks when she signed the forms promising that she would not.

Therefore, signing the Medicare provider applications would qualify as a knowing misrepresentation under 1347.

So it seems to me, based on that exact language, that the key to the conviction under 1347 was that Guerra was already engaging in kickbacks when she signed the promise not to fail to comply with Medicare. I could be

wrong, but that's how I read it. That's the issue we're briefing.

The reason why I think that's important is because if this case proceeds only on a kickback theory and not on a 1347 fraud theory, we will brief the issue.

I think we briefed it, but we'll say in our findings of fact that kickbacks alone without, quote, fraud does not generate a loss, restitution, et cetera, so the restraining order should not in any way restrict the defendant from using [120] her assets to retain counsel, because there's no government interest sufficient to warrant the restraint on those assets needed simply to penalize the defendant at the end of the case.

The money generated—I think Your Honor used the word "disgorgement", that disgorgement is not a theory that would justify the restraint of assets needed to retain counsel.

THE COURT: Interesting argument. If I'm correct in my recollection that each individual claim has a representation that it's in compliance, that issue is moot.

You know, with all these people who have this much experience in this area of law, not one of you know whether there's a separate representation? I would be shocked if there isn't one.

I believe I've read it in another case, another place, where the anti kickback statute requires such a certification. I would think you all would know since you deal with this, particularly maybe Agent Warren.

MR. SREBNICK: I was relying on the documents that have been submitted in the record.

THE COURT: I understand. Let's take a break so they can have a little conference over here.

MS. TORRES: Your Honor, we will confirm that for the Court, and we'll include that in our proposed findings.

THE COURT: Does nobody know about that?

MS. TORRES: Not enough to make that representation to [121] the Court today, Your Honor.

THE COURT: Do you have a copy of a request for payment?

MS. TORRES: Not with me, Your Honor. Most of them are submitted electronically. We don't have copies with us today.

THE COURT: Okay.

MS. TORRES: We also propose to include additional briefing. We'll amend our proposed conclusions of law to rebut the suggestion that once a Medicare enrollment application is signed, that that somehow lapses at a certain point in time and, therefore, any unlawful statements or violations of law performed thereafter are somehow not caught by their original certification.

THE COURT: I don't think he means they lapse, per se. It's a little different argument, but it's close to that.

MR. SREBNICK: If I may also flag another issue that we think is developed from this record. There is a safe harbor provision under the 42 CFR Section 1001.952 that indicates that remuneration under the kickback statute does not include any amount paid by an employer to an employee who has a modified employment relationship with the employer for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare.

To the extent that some of the CWs were employees of [122] either LTC or Professional, I think three of them were so categorized during the agent's testimony,

payments to those employees are not included in the term "kickback" because I think a company can pay its employees for generating patients.

Of course, if the patients are bogus, that's another problem, but just on the pure kickback question, we're going to address this safe harbor provision.

We believe that the testimony would allow the Court to conclude that those patients were not kickback patients. It's simply remuneration for an employee for generating business for the company. That's the second issue we intend to raise based on this presentation.

If I may have a moment.

MR. SCOTT SREBNICK: Good afternoon, Your Honor.

There is one other issue that I wanted to flag that we're looking into, which is based on the testimony today that all the kickbacks occurred in 2009 and earlier, at least on this record.

The government is proceeding under 1345, which allows the Court to restrain assets obtained as a result of a Federal healthcare offense. Federal healthcare offense is defined in 18 U.S.C. Title 24.

That definition was amended in 2010 as a result of the law that is commonly referred to as Obama Care to include the anti kickback provision in Title 42.

[123] So in other words, prior to March 23rd of 2010, violations of the kickback statute were not considered a Federal healthcare offense under 18 U.S.C. 24. There may be, therefore, an expose facto issue about—certainly about the government's ability to forfeit, in the future, assets that are a violation of the kickback statute where the violation occurred in 2009, and so that may be important to whether

the Court even has the authority to restrain the proceeds of violations of the anti kickback statute for violations that occurred in 2009.

I wish it were that clear cut because the statute, Title 24, does define a Federal healthcare offense to also involve violations of 371, the conspiracy statute relating to a Federal healthcare benefit program, and also 1347, which is the healthcare fraud statute.

The bottom line is that this is an issue that just occurred to me today as I was reading the statute again and as I was hearing the testimony about kickbacks.

I would just alert the government that that's an issue that we're going to be looking into as to whether there is even a violation that gives rise to 1345 given the amendment of Title 18 U.S.C. 24 in 2010.

THE COURT: Okay. Anything else?

MR. SREBNICK: That's all we wanted to flag so that there would be the opportunity for both sides, mainly for the [124] government, to anticipate those arguments and for the Court to be aware of them when we submit our written submissions.

As a general proposition, it's a complex case. I understand what the confidential witnesses told the government, but this is why a defendant has a right to be represented in a criminal case to challenge all of this.

What's at stake here is she's going to not have that opportunity if the Court rules that she can't use substitute assets needed to defend herself. These are all very complicated issues, and I hope the Court understands what's at stake.

THE COURT: One thing that I'm certain, and that is that none of the defendants are going to be without

counsel. Judge Marcus even indicated that—he made some kind of a strong hint.

Oh yeah, on page 1326. "It's also worth noting, remembering that a defendant whose assets have been restrained will ultimately receive a thorough hearing, the trial itself. At that trial, the defendant will have counsel, appointed if necessary, will have the right to confront witnesses," et cetera.

So, Ms. Luis will have counsel one way or the other. She may not have counsel of choice, but she certainly will have counsel. I took that as a hint from Judge Marcus that we should consider the fact that there are counsel available for [125] people who can't afford counsel otherwise.

MS. TORRES: Your Honor, if we both submit our papers next Friday, this will be the first time that we get to see their briefing on that issue. Our proposed conclusions of law are already in the record. They're consistent with what the Court asked today.

I would suggest that we be given an additional opportunity to respond to these new issues once we see them briefed.

THE COURT: So you want to wait and not file anything further? I haven't seen your proposed findings of facts and conclusions. Did you make the argument that all that is necessary is the indictment because it talks about the crimes themselves as well as the amount of tainted assets or claims that were paid?

MS. TORRES: We did that as the initial argument, yes. Then, as a back-up, just as the Court suggested today, we went through the evidence in the agent's declarations.

THE COURT: Why don't you decide by the end of the day tomorrow if you want to supplement even a little bit,

and I'll give you an opportunity to respond to them after they're filed.

At this point, only the defendant is going to file a proposed findings of fact and conclusions of law and will raise these points and argue the law.

How much time do you need after that to respond?

[126] MR. SREBNICK: Judge, may I have a moment to confer?

THE COURT: Sure.

MR. SREBNICK: That's all we have, Judge. Thank you.

THE COURT: Let's talk a minute about the last exhibit on the second supplemental declaration of Agent Warren. I think I know the answer to this, but tell me why that is relevant, Ms. Torres.

MS. TORRES: This is the chart showing the cash withdrawals, Your Honor?

THE COURT: Yes.

MS. TORRES: It is supportive of the evidence provided by a number of cooperating witnesses that they were paid kickbacks in cash, and they were very large amounts of cash.

It is also supportive of the information provided by CW9 that the defendant directed her and others to withdraw cash and pay kickbacks with that cash.

THE COURT: The reason I ask that question is because it occurred to me this might come under a 404(b) analysis, or maybe it's intrinsic. It seems to me it could go to showing intent or knowledge of where these funds came from. This appears to me to be stacking. Is that the verb to be used?

MS. TORRES: Structuring, Your Honor.

THE COURT: It doesn't have the impact of showing intent, knowledge, or feeling guilt?

MS. TORRES: We believe it is supportive of that, Your [127] Honor, yes. As CW9 said to the government, the defendant directed these large cash withdrawals that she made herself and that she directed others to make so that cash could then be used for the purpose of paying kickbacks.

THE COURT: I felt that was probably part of the impact of that, that if you structure these cash withdrawals, it might suggest that someone felt that there was something wrong with taking these monies out, if they were taking it out in one lump sum and it might have to be reported and then scrutinized. Just food for thought.

Okay, I'll wait to hear from you regarding your proposed findings of facts. How much time do you need after that?

MS. TORRES: Can I have another week, Your Honor?

THE COURT: Okay.

MS. TORRES: The current TRO expires this Friday—

THE COURT: I'm going to extend that to—I probably should have a date certain. Why don't we do it the following week. Next week we get proposed findings of facts. The following Friday we'll get the response reply. The following week, whatever that Friday is, will be the determination of the TRO. I'll extend it to that point.

I don't have a calendar, so I don't know the exact date, but we'll get an order out extending the TRO until that point in time.

[128] MR. SREBNICK: There's one matter we wanted to address at sidebar.

THE COURT: All right.

[Proceedings at sidebar follow]:

MR. SREBNICK: When I was examining the agent regarding confidential witness number 1, I inadvertently used the first name of the witness. I stopped myself. I'm not sure if anybody picked it up, but the Court Reporter probably did.

THE COURT: I did.

MR. SREBNICK: It's the government's request, and given the Court's ruling, that the matter be not available to the public that I used that word.

THE COURT: Why can't we expunge that word from the record so the—

MS. TORRES: Strike it from the record.

MR. SREBNICK: Now, I wanted to let the Court know the unsung hero of law clerks, your law clerk has been excellent in assisting us. He deserves some credit for that.

[Proceedings in open court follow]:

THE COURT: If there's nothing further for this afternoon, we'll wait for your papers.

[Proceedings recessed at 2:30 p.m.]

[129] CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

/S/ Robin Marie Dispenzieri
ROBIN MARIE DISPENZIERI, RPR-CP
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In The
Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

Whether a pretrial injunction prohibiting a defendant from spending untainted assets to retain counsel of choice in a criminal case violates the Fifth and Sixth Amendments.

PARTIES TO THE PROCEEDING

The petitioner, Sila Luis, was the defendant in the district court and the appellant in the court of appeals. The respondent is the United States of America. Co-defendants Myriam Acevedo and Elsa Ruiz neither contested nor appealed the challenged injunction.

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OPINIONS BELOW

The Government brought this civil action under 18 U.S.C. § 1345 in the Southern District of Florida. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1345. That court's injunction, precluding Ms. Luis from using her assets to retain defense counsel in a criminal proceeding, is at P.App. 4. Its factual findings and legal conclusions, published at *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. 2013), appear at P.App. 8.

The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1292(a)(1). Its opinion, *United States v. Luis*, 564 F. App'x 493 (CA11 2014) (*per curiam*), is at P.App. 1.

The Eleventh Circuit's order denying rehearing and rehearing en banc entered on July 9, 2014 is reproduced as P.App. 35-36.

STATEMENT OF JURISDICTION

This Petition for a Writ of Certiorari was timely filed on October 7, 2014. The Court granted the Petition on June 8, 2015.

The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall be deprived of property, without due process of law. " U.S. CONST. amend. V.

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

18 U.S.C. § 1345 provides:

(a)(1) If a person is –

(A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title;

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or

(C) committing or about to commit a Federal health care offense;

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a

banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court –

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to –

(i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has

been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

Two Terms ago, this Court reaffirmed that tainted assets (those traceable to a crime) may be restrained pretrial and forfeited upon conviction, even when those assets are needed to retain counsel of choice in a criminal case. *Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090, 1105 (2014); *accord United States v. Monsanto*, 491 U.S. 600, 616 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 631 (1989). In rejecting constitutional challenges to pretrial restraints under 21 U.S.C. § 853, it was significant that the restrained assets were tainted. *See Kaley*, 134 S. Ct. at 1095 (noting that "no one contests that the assets in question derive from, or were used in committing, the offenses").

Addressing a different pretrial restraint statute, 18 U.S.C. § 1345, the Eleventh Circuit upheld an injunction that currently prohibits petitioner from spending any of her assets, including undisputedly untainted funds needed by her to engage private counsel in a related criminal case. In upholding the injunction, the Eleventh Circuit interpreted *Kaley*, *Monsanto* and *Caplin & Drysdale* to "foreclose" petitioner's constitutional challenge to the pretrial restraint of legitimate, untainted funds needed to retain private counsel. The Eleventh Circuit also

cited its prior decision in *United States v. DBB, Inc.*, 180 F.3d 1277, 1284 (CA11 1999), a case that construed section 1345 as explicitly authorizing the restraint of untainted assets and rejected statutory arguments to the contrary. *United States v. Luis*, No. 13-13719, 564 F. App'x 493, 494 (CA11 2014). P.App. 3.

The injunction continues to prevent petitioner from using her untainted assets to retain counsel in the related criminal case. That criminal case has been stayed pending the outcome in this Court.

PROCEDURAL HISTORY AND FACTS

Until her indictment on October 2, 2012, Ms. Luis was in the health-care business, providing care to homebound patients. The indictment charged her and two others with paying and conspiring to pay illegal kickbacks for patient referrals, and conspiring to defraud Medicare by billing for unnecessary or unperformed services. DE58-2:5-14. The indictment alleged that Ms. Luis was the owner and operator of LTC Professional Consultants, Inc. and Professional Home Care Solutions, Inc. DE58-2:6-7. It alleged that, between 2006 and 2012, the two companies fraudulently received $45 million in Medicare reimbursements. The indictment sought a forfeiture in that amount under 18 U.S.C. § 982. DE58-2:14-16. During the pendency of the alleged scheme, the companies earned at least $15 million from sources other than Medicare. J.App. 161-62.

The Government simultaneously brought this civil action seeking a temporary restraining order and an injunction under 18 U.S.C. § 1345 to freeze all of Ms. Luis's personal assets, however obtained. Section 1345 provides that, if "a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of [fraud] or property which is traceable to" fraud, the Government can petition the court to (A) "enjoin such alienation or disposition of property" or (B) obtain "a restraining order to prohibit" the alienation "of any such property or property of equivalent value[.]"

The Government filed under seal its complaint, J.App. 9, and ex parte motion, DE4, supported only by FBI Agent Christopher Warren's declaration summarizing the purported hearsay statements of eight unidentified informants. J.App. 17-29, 40-55. Agent Warren listed real estate and bank accounts belonging to Ms. Luis, her family and related corporate entities. The district court entered the temporary restraining order ("TRO") the next day. J.App. 56-64. With the ex parte TRO, the Government succeeded in freezing bank accounts and filing notices of lis pendens against real estate worth approximately $2 million. DE19-26, 49:1. In addition, Ms. Luis disclosed to the court and the Government bank accounts and properties she owned in Mexico, which she agreed would likewise remain under restraint. J.App. 87-88.

The district court set a hearing on the Government's motion for a preliminary injunction. At the request of one or both parties, the hearing was continued

several times so that the parties could file pleadings and prepare for the hearing. DE18, 37, 44, 54, 79.

Because Ms. Luis has "much less than $45 million in personal assets," DE124:7 – i.e., less than the amount she was restrained from spending – she moved after her arrest to modify the order so she could retain a private attorney and fund her criminal defense. DE46. Investigating the Government's allegations entails reviewing records of services provided to more than 1,900 Medicare patients and 1,000 other patients by more than 200 doctors, 400 nurses and therapists, and 20 laboratories. DE58:2. The cost of defending against such allegations can run into the hundreds of thousands of dollars. DE53:3 n.3.

Constrained by binding circuit precedent construing section 1345 as authorizing the restraint of untainted assets, *see DBB*, 180 F.3d at 1286, Ms. Luis argued that enjoining her from spending her untainted assets to mount a defense to the related criminal charges violated the Fifth and Sixth Amendments. DE46:5. The Government opposed releasing untainted assets for payment of counsel, insisting that even those assets not involved in the alleged fraud should be earmarked to satisfy the criminal monetary judgment for forfeiture and restitution it hoped to obtain should Ms. Luis be convicted.[1] DE49:4. The Government filed

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[1] Under 21 U.S.C. § 853(p) and 18 U.S.C. § 982(b), a court may order the forfeiture, after conviction, of "substitute property" of a defendant under certain circumstances if the tainted assets are unavailable.

a supplemental declaration by Agent Warren, in which he claimed that he had traced Medicare proceeds going into the bank accounts and properties of Ms. Luis, her family members and her companies. J.App. 71-75.

Ms. Luis moved to subpoena physicians and laboratories to show that treatments billed to Medicare were, contrary to the Government's allegations, needed and provided, which would prove that there was no fraud in the delivery of services and thereby undermine the informants' credibility. DE58. To avoid having to substantiate its fraud allegations, the Government announced it would rely only on the kickback allegations to support the requested injunction. DE71:9 ("[T]he United States respectfully requests that the Court preclude the introduction of evidence regarding medical necessity at the initial preliminary injunction hearing and limit that hearing to whether the United States has demonstrated probable cause to believe that Defendant Luis conspired to pay or paid health care kickbacks.").[2]

During a case conference, the district court ruled that, if the injunction were based only on kickbacks, evidence demonstrating the legitimacy of the

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[2] Confining its allegations to a violation of the anti-kickback statutes should have substantially reduced the amount potentially subject to restitution, because in the Eleventh Circuit, the government's harm from the payment of kickbacks is the amount of the kickback, not the total revenue received from Medicare. *United States v. Bane*, 720 F.3d 818, 827-28 (CA11 2013).

health-care services would be irrelevant to any issue – including the credibility of the informants' contradictory statements. DE87:16. Antithetically, the court expressed misgivings about Ms. Luis having no "opportunity to cross-examine [the informants] to determine whether they're telling the truth or not," and ordered the Government to produce the FBI's reports of informant interviews. DE87:46, 56-57. It also reserved deciding what standard of proof the Government had to meet for the injunction. DE87:63.

The Government produced only those reports that Agent Warren himself wrote, after redacting them to the point of near incomprehensibility. DE86:5-8. Ms. Luis then moved to discover the informants' identities and to exclude hearsay from the preliminary-injunction hearing: "The rules of evidence and the constitutional right to due process and confrontation require at least as much." DE86:10. The Government responded that it need establish only probable cause to believe Ms. Luis defrauded Medicare in an amount exceeding her net worth. Therefore, the indictment and the hearsay summarized in its agent's declarations entitled it to the injunction. DE90:11. Ms. Luis maintained that probable cause was constitutionally inadequate in the circumstances. J.App. 86.

Five days before the hearing, the Government filed a second supplemental declaration by Agent Warren. This one recounted a ninth unnamed informant's claims that Ms. Luis paid illegal kickbacks. J.App. 79-80. It also stated that the "total amount paid by Medicare to [the two companies] for patients

identified by [the eight unnamed informants] as having been paid kickbacks is $4,356,553.85." J.App. 79.

The hearing convened on February 6, 2013. At the outset, the court adopted the Government's view that the indictment itself established probable cause. J.App. 86, 93. Second, over objection that "even in those proceedings where the rules of evidence are relaxed hearsay is not automatically admissible," DE86:9, the court admitted Agent Warren's hearsay declarations in lieu of testimony. J.App. 94-95. The court permitted defense counsel to cross-examine Agent Warren, but denied Ms. Luis's request for a "full adversarial hearing where she should be allowed to cross-examine the [confidential informants]." P.App. 16. The confidential informants were barred from being called to the stand or even being named in open court. J.App. 106.

The cross-examination of Agent Warren revealed he had no personal knowledge of the facts. Rather, he was relying on unsworn debriefings of confidential informants, who had themselves engaged in other criminal activity, had significant credibility issues, and were cooperating with the Government in exchange for leniency. J.App. 95-151. The district court precluded Ms. Luis from establishing that Medicare was billed for medical services that were necessary and delivered. *E.g.*, J.App. 115 ("[AUSA]: Your Honor, if I may object. I believe we previously discussed the issue of medical necessity versus kickbacks. My understanding was that the hearing today would be

focused on the issue of kickbacks. THE COURT: I sustain the objection.").

The only specific evidence in the record regarding the amount of kickbacks paid was the hearsay assertion in the Warren Declaration that one confidential informant claimed to have been paid $186,000. J.App. 46, 131. In Agent Warren's Second Supplemental Declaration, Agent Warren stated that the defendants "withdrew substantial amounts of cash from the companies corporate accounts, *apparently* in order to pay kickbacks." J.App. 80 (emphasis added). Agent Warren attested that the cash withdrawals "total[ed] over $1 million from February 2006 through June 2009." *Id.* At the hearing Agent Warren testified that the withdrawals "indicated a large pull of cash in order to pay these recruiters who brought them patients." J.App. 169.

Before the lunch break, the judge told the parties that it made no difference whether Ms. Luis had untainted assets: "Based on the wording of 1345, substitute properties are assets, are just as good as tainted assets. That's my view. Maybe a stipulation in that regard might be useful to everybody." J.App. 158. The parties stipulated

> that an unquantified amount of revenue not connected to the indictment flowed into some of the accounts and some of the real estate that is currently subject to the temporary restraining order.

> Accordingly, as a result, the government agrees that the defendant has made a sufficient showing that the TRO may currently be restraining substitute assets that would otherwise be available to retain counsel of choice.

J.App. 161. Additionally, Ms. Luis offered un-rebutted evidence that the businesses generated revenue of over $15 million from sources other than Medicare. J.App. 161-62.

In a post-hearing memorandum, Ms. Luis reiterated that an injunction preventing her from retaining private counsel and funding her criminal defense with untainted assets violated her Sixth Amendment right to counsel of choice and her Fifth Amendment rights to "procedural and substantive due process." DE102:22-28.

On June 24, 2013, the district court ruled it would issue the injunction. The injunction stated that

> because the United States' motion is based on 18 U.S.C. § 1345, which expressly authorizes injunctive relief to protect the public interest, no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a preliminary injunction in this case.

P.App. 5. Even though the Government had disclaimed any reliance on the theory that Medicare had been billed for medically unnecessary services, the

court nevertheless enjoined Ms. Luis from alienating any property whatsoever "up to the equivalent value of the proceeds of the Federal health care fraud ($45 million)." P.App. 6.

In its published order, the district court recounted as factual findings the informants' hearsay allegations that Agent Warren summarized. P.App. 13-14. The order explained that Agent Warren's declarations and the indictment were sufficient to establish probable cause. P.App. 14-15. The court alternatively found that the Government had also satisfied the preponderance standard. P.App. 15 n.3.[3] The court characterized its proceeding as "evidentiary" even though the Government relied exclusively on hearsay from unsworn, confidential informants, P.App. 19, and Ms. Luis was kept from presenting evidence to refute the allegations of unnecessary or undelivered services. P.App. 24-25.

On appeal, Ms. Luis reiterated her arguments: (i) the Due Process and Right-to-Counsel Clauses disallow the Government's restraint of rightfully owned assets needed to retain chosen counsel; (ii) probable

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[3] "Even under the preponderance standard, the Government has carried its burden of proof to enter an injunction restraining at least $40.5 million dollars, which is 90% of $45 million. This finding is based on the indictment, as well as Special Agent Warren's affidavits detailing the crimes, receipt of Medicare funds, and dissipation of assets, including CW9's statement that 90% of LTC and Professional's patients received kickbacks." P.App. 15 n.3.

cause is a "constitutionally inadequate" standard to restrain assets needed to pay defense counsel; and (iii) the Government's reliance on hearsay to support its motion for the injunction violates due process. Appellant's Brief, *United States v. Luis*, No. 13-13719 (CA11), at 36, 41-42, 44.

The appellate court held that Ms. Luis's arguments were "foreclosed by" *Kaley*, *Caplin & Drysdale, Monsanto* and *DBB*. *United States v. Luis*, No. 13-13719, 564 F. App'x 493 (2014) (*per curiam*). P.App. 3. After the Eleventh Circuit denied Ms. Luis's petition for rehearing *en banc*, P.App. 35, this Court issued a writ of certiorari.

SUMMARY OF THE ARGUMENT

The injunction, insofar as it prohibits Ms. Luis from spending her legitimate, untainted assets to defend herself against criminal charges, violates her Sixth Amendment right to counsel of choice and Fifth Amendment right to due process and a fair adversarial proceeding. The lower courts failed to appreciate the significant, historical distinction between tainted assets, whose expenditure may be enjoined pretrial because they never legitimately belonged to the criminal defendant in the first place, with untainted assets which are owned by the defendant and in which the Government has no legitimate interest until it obtains a judgment of conviction. The lower courts improperly elevated the Government's speculative

interest in collecting a potential criminal money judgment over Ms. Luis's constitutional rights.

Significantly, 18 U.S.C. § 1345, the statute invoked by the Government to enjoin the expenditure of untainted assets, is susceptible to a common-sense construction which altogether avoids these serious constitutional questions. Specifically, the plain language of the statute authorizes a "restraining order" against tainted and untainted assets (*i.e.*, "property of equivalent value") until "the hearing," at which time the assets proven to be tainted may be enjoined and the untainted assets freed from restraint. Neither the statute nor the federal courts' equitable powers sanction dispossessing a litigant of her rightful property before a money judgment.

Finally, even assuming the injunction against the expenditure of untainted assets on counsel of choice is authorized by statute and not categorically prohibited by the Fifth and Sixth Amendments, the procedures which yield the injunction must comport with due process. Given the stakes, a mere showing of probable cause based on rank hearsay is constitutionally inadequate.

While ordinary seizures may be constitutionally reasonable on probable cause, more is required when a prolonged seizure interferes with the exercise of a constitutional right. Displacing a defendant's chosen advocate in a criminal case undermines the fairness of the proceeding and implicates protected expression; the injunction works a prior restraint like any other.

Probable cause is too low a standard to enable the Government to veto a defendant's choice of counsel and thereby affect the arguments she will propound in court.

ARGUMENT

I. The injunction violates Ms. Luis's rights under the Sixth Amendment by prohibiting her from using her legitimate, untainted assets to retain counsel of choice

The Government obtained, on probable cause to believe the petitioner is guilty of un-adjudicated charges, an injunction preventing her from using indisputably untainted assets to hire private counsel and fund her defense to those same charges. This augurs not only "an error in the trial process itself," but one that degrades "the framework within which the trial proceeds." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006).

A. A criminal defendant's present interest in retaining counsel of choice, and the public's interest in a fair adversarial proceeding, outweigh the Government's speculative interest in preserving untainted assets for collection of a potential future criminal monetary judgment

The Sixth Amendment right to counsel does not merely require that an accused be represented by some lawyer. "It commands that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, 548 U.S. at 146; *accord Wheat v. United States*, 486 U.S. 153, 159 (1988) ("[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment "); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."). Private lawyers, particularly experienced practitioners, may command higher fees than government-paid lawyers. *Martel v. Clair*, ___ U.S. ___, 132 S. Ct. 1276, 1285 (2012) (finding that Congress provided capital defense lawyers "higher rates of compensation, in part to attract better counsel"). That expense, however, affords the client greater control over and fuller participation in the decisions affecting her fate and in turn fortifies the public's faith in the justice system.

The restraint of untainted assets needed to retain counsel poses a serious threat to the constitutional

right to counsel of choice and the balance of forces in a criminal case. A statute that dispossesses a presumptively innocent defendant of her untainted assets before trial – denying her the financial ability to retain counsel – undermines the adversarial system of justice.

This Court has previously addressed the constitutionality of restraining and forfeiting *tainted* assets earmarked for attorneys' fees. In the context of a different criminal statute, 21 U.S.C. § 853, *Caplin & Drysdale* rejected Fifth and Sixth Amendment challenges to the forfeiture of drug proceeds paid to a criminal defense attorney, reasoning that under the "relation-back" doctrine of the forfeiture statutes, the Government has a vested property interest in tainted property upon commission of the act giving rise to forfeiture. 491 U.S. at 627. The Court reasoned that "[w]hatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of counsel.'" *Id.* at 626 (emphasis added) (citation omitted). This "taint theory" has "long been recognized in forfeiture cases." *Id.* at 627 (citation omitted).

Based on the same reasoning, *Monsanto* upheld the pretrial restraint of *tainted* assets under 21 U.S.C. § 853 against the Fifth and Sixth Amendment challenges. *Monsanto*, 491 U.S. at 616.

And just two Terms ago, *Kaley* held that when the Government restrains *tainted* assets needed to retain counsel of choice under section 853, the Fifth and Sixth Amendments do not require that a defendant be afforded a pretrial hearing to challenge the grand jury's finding of probable cause. *Kaley*, 134 S. Ct. at 1100-05.

These cases all involved tainted assets that were allegedly traceable to, or the instrumentalities of, a crime. *See, e.g.*, *Caplin & Drysdale*, 491 U.S. at 629 (describing "ill-gotten gains" and "profits of crime" as forfeitable); *Monsanto*, 491 U.S. at 602 (noting that the indictment alleged that the assets subject to forfeiture "had been accumulated by respondent as a result of his narcotics trafficking"); *Kaley*, 134 S. Ct. at 1095 (noting that "no one contests that the assets in question derive from, or were used in committing, the offenses"). This circumstance animated the Court's decisions. *See Caplin & Drysdale*, 491 U.S. at 626 (using a bank robbery proceeds hypothetical to explain that a defendant "has no Sixth Amendment right to spend another person's money for services rendered by an attorney "); *Kaley*, 134 S. Ct. at 1096-97 (recalling the bank robbery proceeds hypothetical to hold that *Caplin & Drysdale*, "cast the die" on the Kaleys' constitutional challenge). No aspect of the Court's holdings in *Caplin & Drysdale*, *Monsanto*, or *Kaley* suggested that the pretrial restraint of *untainted* assets would meet a similar fate.

In its Brief in Opposition to the Petition for a Writ of Certiorari, the Government asserted that this Court implicitly addressed the restraint of substitute assets in *Monsanto* and *Caplin & Drysdale*. While admitting that the facts in those cases involved exclusively the restraint of tainted assets, the Government claimed:

> In both cases, however, the Court repeatedly recognized that the relevant characteristic of the assets was not that they were "tainted" by the crime, but simply that they were forfeitable by statute. *Monsanto*'s holding about the constitutionality of pretrial asset restraint has nothing to do with the specific statutory basis for deeming particular assets to be forfeitable. Rather, the Court held that a pretrial restraint is permissible, even in the face of a claim that the restrained assets are needed to pay for counsel, so long as there is "probable cause to believe that the assets are forfeitable."

BIO 9-10 (citations omitted). Insofar as untainted assets are potentially "forfeitable" as substitute assets after conviction, 21 U.S.C. § 853(p) ("Forfeiture of substitute property"), the Government contended that this Court upheld the constitutionality of restraining untainted assets needed to retain counsel.

But when this Court used the term "forfeitable" in *Monsanto* and *Caplin & Drysdale*, this Court was referring exclusively to tainted assets. This Court cited 21 U.S.C. § 853(a) ("Property subject to criminal

forfeiture") as the source statute "that authorizes forfeiture to the Government of 'property constituting, or derived from proceeds obtained' from" criminal activity. *Caplin & Drysdale*, 491 U.S. at 619-20. The Court never once cited 21 U.S.C. § 853(p) ("Forfeiture of substitute property"). Invoking the bank robber hypothetical, the Court posited:

> A robbery suspect, for example, has no Sixth Amendment right to use *funds he has stolen from a bank* to retain an attorney to defend him if he is apprehended. The money, though in his possession, is not rightfully his; the Government does not violate the Sixth Amendment if it seizes the *robbery proceeds* and refuses to permit the defendant to use them to pay for his defense. [N]o lawyer, in any case, has the right to accept stolen property, or ransom money, in payment of a fee. The privilege to practice law is not a license to steal.

491 U.S. at 626 (citation and quotation omitted). *Caplin & Drysdale* cited the "relation-back" provision, 21 U.S.C. § 853(c), a codification of the "taint theory," as "dictat[ing] that 'all right, title and interest in *property' obtained by criminals via the illicit means* 'vests in the United States upon the commission of the act giving rise to forfeiture.'" *Id.* at 627 (emphasis added). In describing "the long-recognized and lawful practice of vesting title to any *forfeitable assets*," the Court specified "assets *derived from the crime*." *Id.* at 627-28 (emphasis added). Any reference in those cases to "forfeitable" assets was shorthand for

tainted assets. *See also id.* at 630 ("'We reject any notion of a constitutional right to use *the proceeds of crime* to finance an expensive defense.'") (citation omitted).[4]

This Court has held that the restraint of tainted assets does not offend the Sixth Amendment because, under the relation-back doctrine, proceeds traceable to the offense do not belong to the defendant in the first place. *Caplin & Drysdale*, 491 U.S. at 627. The Government's right to property traceable to the crime vests upon the commission of the crime, even if title is not perfected until judgment. *United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. 111, 126 (1993).

By contrast, the relation-back doctrine does not apply to untainted assets, either as a matter of statutory construction or common law. *See, e.g.*, *United States v. Erpenbeck*, 682 F.3d 472, 477-78 (CA6 2012); *United States v. Jarvis*, 499 F.3d 1196, 1204 (CA10 2007). *But see United States v. McHan*, 345 F.3d 262 (CA4 2003). Unlike tainted assets, which are never legally owned by a defendant who commits the crime, untainted, substitute assets are

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[4] As petitioner established in her Reply Brief in support of the Petition (at 4-7), the government's briefs in *Monsanto* and *Caplin & Drysdale* repeatedly invited the Court to use the terms "forfeitable," "forfeited" and "tainted" interchangeably. *See* Brief for the United States in *United States v. Monsanto*, No. 88-454, 1989 WL 1115135 at *20-21, 28-31, 37, 41-42; Brief for the United States in *Caplin & Drysdale, Chtd. v. United States*, No. 87-1729, 1988 WL 1026332 (U.S.) at *13, 29, 33, 35-36, 42.

owned by the defendant irrespective of the crime and, by definition, are not criminal proceeds. The Government possesses no property right in a defendant's untainted assets prior to trial.

The law and our nation's history recognize a constitutionally significant distinction between tainted and untainted assets. In England, three kinds of forfeiture had been established when the Sixth Amendment was ratified in the United States: 1) deodand, 2) forfeiture upon conviction for a felony or treason, and 3) statutory forfeiture. *See generally Austin v. United States*, 509 U.S. 602, 612-13 (1993). Deodand (not relevant to this case) reflected the view that the value of an object "causing the accidental death of a King's subject was forfeited to the Crown ." *Id.* at 611 (quoting *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-81 (1974)). Forfeiture upon conviction for a felony or treason (*i.e.*, in personam forfeiture) was a forfeiture of estate, which served to punish felons and traitors for violating society's laws. Statutory forfeiture sought to forfeit objects used in violation of the customs and revenue laws – *i.e.*, in rem forfeitures. *Austin*, 509 U.S. at 612.

"Of England's three kinds of forfeiture, only the third took hold in the United States." *Id.* at 613. That is, the only forfeiture recognized by "the common law courts in the Colonies – and later in the states during the period of Confederation" – was in rem forfeiture, based on the fiction that the property itself is guilty of the crime and thereby tainted. *Id.*; *see also 92 Buena Vista Avenue*, 507 U.S. at 121 ("In all of these

early cases the Government's right to take possession of property stemmed from the misuse of the property itself."). The Founding Fathers so disdained in personam "forfeiture of estate" penalties that they banned them in the Constitution for the crime of treason. *See* U.S. CONST., art. III, § 3, cl. 2. "The First Congress [in 1790] explicitly rejected in personam forfeitures as punishments for federal crimes, and Congress reenacted this ban several times over the course of two centuries." *United States v. Bajakajian*, 524 U.S. 321, 328 n.7 (1998) (citation omitted). It was not until 1970 that Congress resuscitated the in personam forfeiture penalty for organized crime and major drug trafficking; not until 1984 that these laws authorized ex parte pretrial restraining orders (*e.g.*, 21 U.S.C. § 853(e)); not until 1986 that the laws authorized the forfeiture of substitute assets upon the satisfaction of certain conditions, 21 U.S.C. § 853(p); and not until 1996 that Congress authorized forfeitures for health-care fraud offenses (18 U.S.C. § 982(a)(7)).

The notion that a court, upon request of the Government, would enjoin a presumptively innocent accused from using her own legitimately-earned assets to retain counsel – so that these untainted, substitute assets would be available to the Government as an in personam penalty upon conviction – would have been inconceivable to the Founding Fathers. After all, at the time the Sixth Amendment was ratified, the right to appointed counsel had not yet been recognized as fundamental in all criminal

cases. *See generally Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). In those days, the only lawyer available to a criminal defendant was the lawyer who the defendant could afford to retain.

Of course, it is now well-settled that the Sixth Amendment right to counsel of choice is a "structural right," and the erroneous deprivation of the right to "be defended by the counsel he believes to be the best" is per se reversible, because it affects "the framework within which the trial proceeds." *Gonzalez-Lopez*, 548 U.S. at 146, 148-50. The adversary system of justice depends upon confidence in "an independent bar as a check on prosecutorial abuse and government overreaching. Granting the Government the power to take away a defendant's chosen advocate strikes at the heart of that significant role." *Kaley*, 134 S. Ct. at 1114-15 (Roberts, C.J., dissenting).

The right to be represented by counsel is among the most fundamental of rights. As a general matter, it is through counsel that all other rights of the accused are protected: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Warren V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956); *cited in Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986).

As an accused makes her way through the criminal legal process, her confidence in the independence of her counsel is of the utmost significance. Her ability to choose that counsel is the first step. An accused's choice is not merely a matter of identifying an attorney with technical skills. The accused wants an attorney in whom she can trust and who will consider her views in the handling of the case. "An attorney undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy. That obligation, however, does not require counsel to obtain the defendant's consent to every tactical decision." *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (citations and quotations omitted). The attorney exercises authority to manage most aspects of the defense without obtaining the client's approval. *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988).

Trust and confidence, therefore, is the bedrock of the attorney-client relationship. "[T]he ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." *United States v. Laura*, 607 F.2d 52, 57 (CA3 1979). Indeed, "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps

most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution." ABA Standard 4-3.1, commentary, 149-50.

When the court and/or the prosecution intervenes to deny the accused her chosen counsel without justification, the accused's capacity to trust any counsel is invariably diminished. The offer of a "public" lawyer under the circumstances tends to breed suspicion in the mind of the accused – not a healthy start to a relationship that necessarily depends upon collaboration and trust to make life-altering decisions.

So when that appointed attorney urges a course of action, say "a 'fast track' plea bargain in exchange for a reduced sentence recommendation," *United States v. Ruiz*, 536 U.S. 622, 622 (2002), the accused may doubt counsel's allegiance, even though he is faithfully discharging his constitutional duty. *See Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399, 1408 (2012) ("[D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). Our justice system entrusts to counsel strategy decisions that can determine the accused's fate, sometimes a matter of life or death. *See Florida v. Nixon*, 543 U.S. at 181 (affirming death sentence of a defendant whose appointed counsel conceded guilt at trial without the defendant's express consent); *Haynes v. Cain*, 298 F.3d 375, 382-83 (CA5 2002) (en banc) (affirming life sentence of a

defendant whose appointed counsel conceded guilt at trial, over client's objection).

Forbidding the accused to retain a private attorney with her rightful assets has broad implications, for it erodes the public's confidence in the justice system. The public has an interest in the availability of legal services independent of the sovereign that prosecutes. The private criminal defense bar provides a significant check on the power of the prosecutor and judge. An independent defense bar thus serves a unique role in the adversarial system of justice.

> Simply put, the Constitution treats the activities of criminal defense attorneys differently precisely because they are different, from an institutional perspective, from other members of the profession. In the context of the criminal justice system, the defendant's attorney must utilize the adversary system to accomplish an additional function – to exercise the systemic restraints placed upon the power of government in our society of liberties.

Morgan Cloud, *Forfeiting Defense Attorneys' Fees: Applying An Institutional Role Theory To Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1, 1-4, 8-9.

In complex criminal prosecutions, much time, energy and resources must be devoted to properly prepare for litigation against the Government. "[T]he quality of a criminal defendant's representation frequently may turn on his ability to retain the best

counsel money can buy." *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring in result). No one expects private counsel to undertake the representation gratis.

Without access to her untainted property, an accused has no meaningful way to exercise her right to counsel of choice. The deprivation of property, albeit temporary, works a permanent deprivation of the right: "The defendant needs the attorney now if the attorney is to do [her] any good." *United States v. E-Gold, Ltd.*, 521 F.3d 411, 417-18 (CADC 2008) (citations omitted). The deprivation upsets the "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The injunction prevents her from mounting a no-holds-barred defense that she could otherwise afford but for the restraint.

It is true that "the Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159 (1988). A court must concern itself with "[n]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases." *Id.* at 160. For example, a court may disallow a particular advocate from participating as counsel in a case if he is not a member of the bar or if he labors under a conflict of interest. *Id.*

But there is no "institutional interest" in preventing an accused from meaningfully exercising her

constitutional right to retain a private lawyer and finance her defense. The injunction only serves the Government's interest. The Government claims a possible future interest in Ms. Luis's untainted assets. The Government's claim is speculative, at best. Because the assets at issue are not tainted, the Government has no property interest in those assets. This is not the proverbial bank loot. *See Caplin & Drysdale*, 491 U.S. at 626.

Any Government interest in laying claim to an accused's rightfully owned assets at the beginning of the litigation is outweighed by the significant individual and societal interests in the underlying constitutional rights. In balancing the competing interests, the Government has no cognizable interest in gaining a tactical advantage by "beggar[ing] those it prosecutes in order to disable their defense at trial." *Caplin & Drysdale*, 491 U.S. at 635 (Blackmun, J., dissenting). Nor does the Government have a sufficiently weighty interest in confiscating those assets as a punishment, even if to satisfy a possible restitution order in the event of conviction. Given the Government's reliance exclusively on a "kickback" theory of criminal liability – eschewing the allegations that Ms. Luis defrauded Medicare by billing for unnecessary or undelivered services – the Government strains to quantify the harm it alleges. *See United States v. Bane*, 720 F.3d 818, 827-28 (CA11 2013) (the Government's harm from the payment of kickbacks is the amount of the kickback, not the total revenue received from Medicare).

The Fourth Circuit explained: "While there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [the defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice." *United States v. Farmer*, 274 F.3d 800, 804 (CA4 2001) (emphasis added, citations omitted). Where both tainted and untainted assets have been seized, the accused has a right to a hearing to establish that "the government seized untainted assets without probable cause and that [the accused] needs those same assets to hire counsel" in the criminal case. *Id.* at 805.

The Solicitor General appeared to concede as much at the October 2013 oral argument in *Kaley*. The issue was whether a defendant has a right to a hearing on whether an asset restrained by court order (pursuant to 21 U.S.C. § 853, in *Kaley*) is traceable or related to the crime alleged in the indictment. "At oral argument, the Government agreed that a defendant has a constitutional right to a hearing on that question." *Kaley*, 134 S. Ct. at 1095 n.3. It logically follows that if the Government is unable to trace the assets to the alleged crime, then the Constitution forbids the continued restraint of the untainted assets, at least in an amount sufficient to allow the

defendant to retain her counsel of choice and fund her defense.[5]

This Court "[did] not opine on the matter." *Id.* However, the dissenting Justices expressed agreement that the Constitution requires tracing the restrained asset to the charged crime. *Kaley*, 134 S. Ct. at 1108 & n.2 (Roberts, C.J., dissenting) ("Neither the Government nor the majority gives any reason why the District Court may reconsider the grand jury's probable cause finding as to traceability – and in fact constitutionally must, if asked – but may not do so as to the underlying charged offenses.").

Presumably, a court "constitutionally must" trace the asset to the alleged criminal violation because only assets traceable to the crime may be restrained. Conversely, untainted assets may not be restrained – even in the face of a grand jury's finding of probable cause that a crime was committed – when needed for counsel of choice.

Thus, even assuming the statute authorizes an injunction prohibiting the expenditure of "property of equivalent value," 18 U.S.C. § 1345(a)(2)(B)(i), *but see* Argument I.B, *infra*, the injunction must nevertheless accommodate the defendant's constitutional rights to counsel of choice and maintain the "balance of forces" in the courtroom. This is no different than

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[5] In its Brief in Opposition to the Petition, the government offered a different interpretation of that concession. BIO 12-14.

when a court detains a defendant pending trial, *e.g.*, *United States v. Salerno*, 481 U.S. 739 (1987), inasmuch as the court must make reasonable accommodations for a defendant to have access to his counsel of choice. 18 U.S.C. § 3142(i). Any injunction affecting the defendant's untainted assets, therefore, must provide for the release of sufficient funds to pay *bona fide* attorneys fees and legal expenses.

B. As a matter of statutory construction, 18 U.S.C. § 1345 does not authorize a district court to enjoin the expenditure of untainted assets

In the courts below, petitioner was constrained from challenging whether 18 U.S.C. § 1345, as a matter of statutory construction, authorizes an injunction against the expenditure of untainted assets. That issue had been foreclosed by prior precedent of the Court of Appeals. *See United States v. DBB*, 180 F.3d 1277, 1286 (CA11 1999) ("Subsection (a)(2)(B) explicitly provides broader relief for situations where the property obtained through fraud is not as easily identified. It allows the government to prevent the withdrawing, transferring, removing, and dissipating of an amount of the defendant's assets equal to that obtained through fraud . ").

In this Court, however, the canon of constitutional avoidance counsels in favor of considering the statutory basis for reversal to avoid the serious constitutional questions attendant to the restraint of

untainted assets. That canon "allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional questions." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis in original). "It is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (citation omitted).

When first enacted, section 1345 authorized district courts only to enjoin fraudulent acts, which codified the courts' common-law power. Though equity traditionally would not enjoin the commission of crime, it would abate an interference with vested property rights. *See In re Debs*, 158 U.S. 564, 593 (1895). In 1990, Congress amended the statute to provide that, if the Government shows that "a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of [fraud] or property which is traceable to" fraud, courts can (A) "enjoin such alienation or disposition of property" or (B) issue "a restraining order to prohibit" the alienation "of any such property or property of equivalent value[.]" 18 U.S.C. § 1345(a)(2).

The statute's structure thus distinguishes between property derived from or traceable to fraud,

whose alienation can be "enjoin[ed]," § 1345(a)(2)(A), and "property of equivalent value," § 1345(a)(2)(B)(i), which can be impacted only by "a restraining order." Restraining orders and injunctions are, now as when the provision was enacted, different things. An injunction forbids a defendant from "doing some act" which is "unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action at law." Black's Law Dictionary 784 (6th ed. 1990). A restraining order "is distinguishable from an injunction in that the former is intended only as a restraint until the propriety of granting an injunction can be determined and it does no more than restrain the proceeding until such determination." *Id.* at 1314. *See* Fed. R. Civ. P. 65 (distinguishing between restraining orders and injunctions); *see also United States v. Cohen*, 152 F.3d 321, 324 n.4 (CA4 1998) (noting the distinction between restraining orders and injunctions under section 1345(a)(2)). Thus, the most sensible interpretation of the statute contemplates a restraining order of "property of equivalent value" (*i.e.*, tainted and untainted assets) until such time as "the hearing," at which time the Government must be prepared to identify, through proof, the tainted assets that will be the subject of the injunction.

Notwithstanding the statute's plain language, the Eleventh Circuit, in a case dating back to 1999, rejected this construction of the statute, instead adopting the Government's view that section 1345(a)(2)(B)(i) authorizes courts to restrain through the criminal trial all assets that may ultimately be

forfeited or ordered as restitution. *DBB*, 180 F.3d at 1283-84. The defendant in *DBB* urged the Eleventh Circuit to interpret section 1345 according to its text, but the court insisted that Congress could not have meant what it said:

> Under this interpretation, if a defendant is alienating or disposing of property obtained by fraud (or intends to do so), the government may obtain a TRO to freeze "property of equivalent value." But under Fed.R.Civ.P. 65(b) this TRO generally will expire in no more than 10 or 20 days, after which the defendant would be free to transfer the "property of equivalent value" which had been frozen unless by then the government could trace the property to health care fraud. Given the realities and practicalities of litigation, such a TRO would be of dubious value to the government. Congress could not have intended such a result unless it thought that 10 or 20 days would suffice to enable the government to establish that the "property of equivalent value" frozen by the TRO was traceable to the fraud in question and to obtain a preliminary injunction. Common sense requires that we reject the idea that Congress entertained any such notion.

DBB, 180 F.3d at 1283-84.

Common sense actually points the other way. A few days' time suffices for the Government, which as the plaintiff can bring the action when it pleases, to identify tainted assets among the assets the court has

restrained. If the Government cannot then make the requisite showing, it has no right to prevent the defendant from using her property to hire counsel. In contrast, the Government's interpretation, which the Eleventh Circuit accepted, is at odds with the adversarial judicial process:

> [U]nder the United States' interpretation of the statute, the Attorney General would have broad power to freeze assets and prevent the dissipation of them prior to a final judgment. The Attorney General could obtain an *ex parte* TRO upon the filing of the complaint to freeze assets of equivalent value until a hearing on a motion for a preliminary injunction could be held. At the hearing, the United States could obtain an injunction freezing assets of equivalent value and secure the appointment of a temporary receiver to administer the assets pending a final decision in the case. This construction of the statute would preserve the defendant's assets until a judgment requiring restitution or forfeiture could be obtained.

180 F.3d at 1284. This gloss not only ignores the statute's text, it renders part of it surplusage. If "restraining order" means "any form of injunctive relief," as *DBB* held, then § 1345(a)(2)(A) is superfluous because § 1345(a)(2)(B) provides "broader relief" and "overlapping remedies." *Id.* at 1286.

The text aside, accepting the Government's interpretation entails ascribing to Congress the intent to preserve potentially forfeitable assets at all costs,

without regard to settled legal practice, due process, or the right to counsel. One must believe that Congress went about this implicitly, verbosely, ambiguously, redundantly, and through hollow proceedings. If probable cause suffices to freeze Ms. Luis's assets, why would Congress not directly say what the Government claims it meant – that an indictment's forfeiture count automatically effectuates an asset freeze? The obvious reason is that the pretrial restraint of a defendant's untainted property raises serious constitutional concerns.

This statutory interpretation – that section 1345 authorizes a *temporary* restraint, but not an injunction, against the expenditure of untainted assets – is supported by, and consistent with, the historical role of injunctions as instruments of equity. Nothing in the language of section 1345 suggests that Congress intended to expand that historical role or purpose in the context of a federal fraud prosecution seeking a criminal monetary judgment as a sentencing penalty.

Federal courts have no inherent, equitable power to dispossess an owner of her rightful assets to secure a potential future judgment for legal damages. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-27 (1999) ("*GMD*"); *De Beers Consolidated Mines v. United States*, 325 U.S. 212, 222-23 (1945). Equity can do no more than protect a plaintiff's *existing* right to property held by the defendant to avert irreparable harm that will befall the plaintiff before judgment can be had. Because the Government has no claim to Ms. Luis's untainted

assets, the relief it wants is simply unavailable: "Even in the absence of historical support, we would not be inclined to believe that it is merely a question of procedure whether a person's unencumbered assets can be frozen by general-creditor claimants before their claims have been vindicated by judgment. It seems to us that question goes to the substantive rights of all property owners." *GMD*, 527 U.S. at 322-23.

GMD recognized that pretrial asset freezes to secure anticipated judgments erode the integrity of the adversary system by fostering gamesmanship:

> A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants.

GMD, 527 U.S. at 330 (quotations omitted). The travel of this case shows how the Government might avail itself of this tactical advantage. It opposed requests for information supporting its contentions. It opposed identifying the accusers. And it opposed

meaningful confrontation of those accusers.[6] "There is the possibility that prosecutors will seek broad, sweeping restraints recklessly or intentionally encompassing legitimate, nonindictable assets. The loss of such legitimate assets would improperly cripple a defendant's ability to retain counsel." *United States v. Bissell*, 866 F.2d 1343, 1355 (CA11 1989).

In *De Beers*, the Government brought an equitable civil antitrust action against several foreign mining companies and obtained a preliminary injunction freezing all the defendants' domestic assets "to provide security for performance of a future order which may be entered by the court." 325 U.S. at 219. The frozen assets were not the subject matter of the suit. Equating the injunction to a writ of sequestration, the Court vacated it as beyond the district court's power:

> To sustain the challenged order would create a precedent of sweeping effect. . Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods,

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[6] The government's secretiveness is incompatible with its posture as a civil plaintiff seeking extraordinary relief. Neither is it usual for the government to prosecute by ambush: "[I]t is not uncommon for the Government to be required to disclose the names of some potential witnesses in a bill of particulars, where this information is necessary or useful in the defendant's preparation for trial." *Will v. United States*, 389 U.S. 90, 99 (1967).

> impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. No relief of this character has been thought justified in the long history of equity jurisprudence.

Id. at 222-23.

GMD and *De Beers* confirm that courts of equity are not empowered to interfere with a prospective debtor's use of her own property to preserve assets for collection of a prospective money judgment of an uncertain amount. The language of section 1345(a)(2) is consistent with that principle. It permits an injunction against a person's alienation of property "obtained as a result of" an enumerated offense, but not against "property of equivalent value."

The Government is not entitled to extraordinary equitable relief against Ms. Luis's untainted assets. Ms. Luis should be permitted to spend her untainted assets to exercise her constitutional right to hire counsel of her choosing and mount a vigorous defense to the pending criminal charges.

II. Even assuming that enjoining the expenditure of untainted assets on counsel of choice is authorized by statute and not categorically prohibited by the Sixth Amendment, the procedural safeguards employed by the district court violated Due Process

The Due Process Clause of the Fifth Amendment requires adequate safeguards before assets may be restrained. *Mathews v. Eldridge*, 424 U.S. 319 (1976). "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest" because the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Rest. Workers Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 894-95 (1961). However, "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (suspension of welfare benefits invalid if not preceded by an evidentiary hearing giving the recipient an opportunity to confront witnesses and present evidence and argument orally).

To determine the process due in any particular setting, the *Mathews* test considers three factors:

> First, *the private interest* that will be affected by the official action; second, *the risk of an erroneous deprivation* of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, *the Government's interest*, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335 (emphasis added); *accord United States v. James Daniel Good Realty*, 510 U.S. 43, 53 (1993).

The statute that authorized the restraint of untainted assets in this case, 18 U.S.C. § 1345(b), actually provides for a "hearing and determination of such an action," and provides further:

> A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

18 U.S.C. § 1345(b). Section 1345 is silent about the scope of the hearing, the standard of proof and whether the Federal Rules of Evidence apply. *Compare* 21 U.S.C. § 853(e)(3) ("The court may receive and consider, at a hearing held pursuant to this

subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.").

In the courts below, Ms. Luis urged that the Government should bear the burden of proving, through competent evidence, its entitlement to an injunction of untainted assets beyond a reasonable doubt, the same standard of proof that will govern the pending criminal trial and determine whether the assets will ultimately be subject to forfeiture. J.App. 86. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 429 (2006) ("[T]he burdens at the preliminary injunction stage track the burdens at trial."); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986) ("[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits."); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("And what is at issue here is not even a defendant's motion for summary judgment, but a plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher.").

After acknowledging that "[s]everal courts have applied the preponderance of the evidence standard to claims for injunctive relief under section 1345," the district court concluded that probable cause was the applicable standard and that it could be established exclusively through hearsay. P.App. 11. The Court of Appeals affirmed, citing *Caplin & Drysdale, Monsanto, Kaley* and *DBB*. P.App. 3.

To be sure, the Court in *Monsanto* and *Kaley* applied the probable cause standard in evaluating whether the restraint of tainted assets interfered with counsel of choice. But the question of which standard of proof *should apply* was not squarely presented in either case.

Monsanto held that drug proceeds can be restrained pretrial, even if needed for attorney's fees, but reserved deciding how courts might identify illegal proceeds. 491 U.S. at 615. Monsanto's assets were frozen after "an extensive, 4-day" adversarial hearing at which the Government proved they were drug proceeds. *Id.* at 615 n.10. The adequacy of the hearing was not at issue. *Id.* Nonetheless, the five-justice majority assumed throughout Part III-B of its opinion "that assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." *Id.* at 615.

The petitioners in *Kaley* did not squarely challenge the probable-cause standard; they instead argued that they had a right to judicial review of an ex parte restraining order that was based solely on an indictment: "With probable cause, a freeze is valid. *The Kaleys little dispute that proposition*; their argument is instead about who should have the last word as to probable cause." 134 S. Ct. at 1097 (emphasis added). Relying on *Monsanto*'s dicta, the Court denied relief: "When we decided *Monsanto*, we effectively decided this case too. If the question in a pretrial forfeiture case is whether there is probable cause to

think the defendant committed the crime alleged, then the answer is: whatever the grand jury decides." *Id.* at 1105.

Kaley's characterization does not transform *Monsanto*'s dicta into a holding. *See United States v. Dixon*, 509 U.S. 688, 706 (1993) ("Quoting [a] suspect dictum multiple times cannot convert it into case law."); *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 557 (2001) (Scalia, J., dissenting) (collecting cases). And whatever the force of *Kaley*'s probable cause discussion, it was in the context of restraining assets admittedly traceable to the alleged crime, not untainted assets.

This Court has never held that probable cause is a constitutionally adequate standard for all seizures or restraints, whatever their effect. Indeed, *Caplin & Drysdale* and *Monsanto* were but two of the three majority opinions concerning forfeitable assets authored by Justice White in 1989. The third, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 50-51 (1989), is the only one that squarely addressed what process must attend a pretrial asset seizure. *Fort Wayne Books* unanimously held that the Government must show more than "mere probable cause" to seize the alleged proceeds and instrumentalities of crime where the seizure chills freedom of speech. *Id.* at 66; *id.* at 68 (Blackmun, J., joining majority's Part III); *id.* at 70 (O'Connor, J., joining majority's Part III); *id.* at 83 (Stevens, J., dissenting on other grounds). That decision's rationale applies with equal force to asset seizures that chill the right to counsel – particularly

where the assets are neither the proceeds nor instrumentalities of the alleged crime.

Fort Wayne Books consolidated for review two racketeering cases, predicated on obscenity crimes. 489 U.S. at 50-51. In the pertinent case, prosecutors sued Fort Wayne Books under Indiana's civil RICO statute, seizing three bookstores and their contents as property "used in the course of or realized through" racketeering. *Id.* at 51. The Court held that the bookseller was entitled to an adversarial, evidentiary hearing at which the prosecutor had to show *more* than probable cause to believe the assets were forfeitable:

> Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved.

Id. at 63. This was so despite the Court's assuming "that bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from," racketeering.[7] *Id.*

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[7] A bare majority of the Court in a later case held that expressive works in fact are forfeitable after trial like other instrumentalities of crime, while reaffirming *Fort Wayne Books*. *Alexander v. United States*, 509 U.S. 544, 551 (1993) (Forfeiture

(Continued on following page)

at 65. The Court held the seizure could be sustained only if the state adduced evidence showing *both* that the defendant committed racketeering and that "the assets seized were forfeitable[.]" *Id.* at 66. "[M]ere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation." *Id.* It is "the risk of prior restraint" – *i.e.*, the risk that the seizure would irremediably abridge protected expression – "that motivates this rule." *Id.* at 63-64.

This reasoning applies as much to governmental interference with property rights that abridges the right to chosen counsel. The Court has repeatedly affirmed that legal advocacy (particularly against the Government) constitutes protected political speech, the First Amendment's core concern. The power to choose an adversary's lawyer is the power to suppress that person's speech and stifle public debate on government actions. No less than the seizure of pornographic books and films, a seizure of assets needed to retain a criminal defense attorney must be supported by greater proof of forfeitability than mere probable cause.

"only deprives him of specific assets that were found to be related to his previous racketeering violations. Assuming, of course, that he has sufficient untainted assets to open new stores . . petitioner can go back into the adult entertainment business tomorrow . . without any risk of being held in contempt for violating a court order.").

The Right-to-Counsel Clause recognizes that criminal defense attorneys articulate their clients' defenses to prosecutors, judges, and jurors more effectively than most clients themselves could. Accordingly, this Court has said repeatedly that the right to counsel effectuates the First and Fifth Amendment right to be *heard*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Powell*, 287 U.S. at 68-69 (quoted in *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938)). Thus, the essence of defense counsel's work is to speak for the client – to provide independent, professional judgment about what to say, when to say it, and how to say it.

While an attorney's speech in his clients' service can be regulated, this Court unanimously held in *Gentile v. State Bar of Nevada* that the First Amendment protects it. 501 U.S. 1030, 1034 (1991) (plurality); *id.* at 1075 (majority); *id.* at 1082 (O'Connor, J., concurring). Moreover, that case held that a defense lawyer's speech on his client's behalf – in and out of the courtroom – is of the highest constitutional order: "The [First Amendment vagueness] inquiry is of particular relevance when one of the classes most affected by the regulation is the criminal defense bar, which has the professional mission to challenge actions of the State." *Id.* at 1051 (majority). *Gentile*, which "concern[ed] allegations of police corruption," *id.* at 1035-36, illustrates that experienced defense attorneys are sometimes the only check on official

malfeasance. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318-19 (2009) ("Confrontation is designed to weed out not only the fraudulent analyst, but the incompetent one as well. Serious deficiencies have been found in the forensic evidence used in criminal trials.").

Correspondingly, this Court has recognized that the First Amendment protects legal advocacy even in civil cases, which carry no express constitutional right to counsel. "[A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *NAACP v. Button*, 371 U.S. 415, 429 (1963).

Given that "[d]ifferent attorneys will pursue different strategies," *Gonzalez-Lopez*, 548 U.S. at 141, it follows that depriving defendants of the resources needed to defend complex cases eases the prosecution's burden by ensuring that certain arguments are never raised. Government action that has the effect of removing advocates and their arguments from the courtroom constitutes an unconstitutional prior restraint on speech. *Cf. Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 548-49 (2001) (Congress could not condition funds for legal aid organizations on those organizations' not raising legal challenges to state welfare laws.).

If prosecutors can expend limitless amounts and veto a defendant's choice among lawyers, they

abridge speech and gain an unconstitutional advantage that undermines the system's integrity:

> In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas.

McConnell v. FEC, 540 U.S. 93, 251 (2003) (Scalia, J.) (citations omitted), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2010).

Our system's foundational premise that confrontation between the prosecution and the accused reliably separates the guilty from the not-guilty depends on the endurance of "a healthy, independent defense bar" to ensure "a truly equal and adversarial presentation of the case." *Caplin & Drysale*, 491 U.S. at 647-48 (Blackmun, J., dissenting). An undemanding standard for denying counsel of choice corrodes the structural right to chosen counsel and threatens the

"'virtual socialization of criminal defense work in this country.'" *Id.* at 647.

Consequently, a restraint of untainted assets that threatens the right to choose one's counsel demands the same constitutional scrutiny as any prior restraint on speech. And, as *Citizens United v. FEC* recognized, Government efforts to muffle speech by limiting a person's spending are a form of prior restraint: "The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity." 558 U.S. 310, 350 (2010). This consequence prevails in the courtroom as much as on the campaign trail: "A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion." *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring). *Citizens United* also recognized that the Government censors speech by favoring one group of speakers over another. 558 U.S. at 340-41. An injunction barring the accused from retaining private counsel allows the Government to choose who will speak for the accused.

"An informed, independent judiciary presumes an informed, independent bar." *Legal Servs.*, 531 U.S. at 545. A robust, independent defense bar contributes more and better speech to criminal jurisprudence, which promotes justice: "By seeking to prohibit the analysis of certain legal issues and to truncate

presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Id.* The health of our adversarial criminal justice system contributes, in turn, to the overall vitality of our democracy. "The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state " *Gentile*, 501 U.S. at 1035 (plurality).

The *Fort Wayne Books* Court's unanimous holding that a probable-cause finding is constitutionally inadequate to support a seizure that might restrain protected speech should apply with equal force to injunctions that restrain untainted property needed for choice of counsel.

Section 1345 does not mandate any standard, much less the probable cause standard that the district court applied, and the Eleventh Circuit affirmed.[8] Indeed, the district court acknowledged that "[r]egarding the applicable burden of proof, there is considerable disagreement in the case law. Several

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[8] Although the district court alternatively found that the government had also satisfied the preponderance standard, *see* note 3, *supra*, the Eleventh Circuit did not affirm on that ground. Rather the Eleventh Circuit affirmed on the basis that "[t]he district court conducted an evidentiary hearing where it heard arguments and testimony and found, based on the hearing and the indictment, that there was probable cause to believe that Luis committed an offense requiring forfeiture, that she possessed forfeitable assets, and that she was alienating those assets." P.App. 3.

courts have applied the preponderance of the evidence standard to claims for injunctive relief under section 1345. Other courts have concluded that a showing of only probable cause is required." P.App. 11 (citations omitted).

The constitutional rights at stake and their relationship to a pending criminal proceeding require the application of a substantially more demanding standard of proof than probable cause. *See California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (recognizing that "the 'clear and convincing' standard [is] reserved to protect particularly important interests in a limited number of civil cases," but noting that the Court "has never required the 'beyond a reasonable doubt' standard to be applied in a civil case.").

Whatever the appropriate standard on the spectrum from "preponderance of the evidence" to "beyond a reasonable doubt," the court cannot enjoin untainted assets needed to retain criminal counsel based solely on hearsay and double hearsay from unsworn confidential informants who were not "test[ed] in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). Given the constitutional rights at stake, the denial of a meaningful opportunity to confront and rebut the accusers violated Due Process. *See Goldberg*, 397 U.S. at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."); *United States v. Frazier*, 26 F.3d 110, 114 (CA11 1994)

(finding due process violation because district court, in revoking supervised release, "made no finding that the hearsay was reliable, nor did it weigh Frazier's right of confrontation against the government's reasons for not producing the witness.").

The district court entered an injunction, financially crippling the accused based on a minimal standard of proof with a minimal evidential showing. Under this framework, the Government can, in virtually every fraud case, control the strength and identity of its adversary based on unsworn information from nameless, faceless accusers. Due process requires more.

CONCLUSION

This Court should reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

SILA LUIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the pretrial restraint of forfeitable substitute assets allegedly needed to retain counsel of choice violates the Fifth or Sixth Amendment.

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In the Supreme Court of the United States

No. 14-419

SILA LUIS, PETITIONER

v.

UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the Federal Reporter but is reprinted in 564 Fed. Appx. 493. The district court's opinion (Pet. App. 8-34) is reported at 966 F. Supp. 2d 1321.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2014. A petition for rehearing was denied on July 9, 2014 (Pet. App. 35-36). The petition for a writ of certiorari was filed on October 7, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix. App., *infra*, 1a-27a.

STATEMENT

In 2012, a grand jury returned an indictment charging petitioner with federal health care fraud offenses and giving notice that the government would seek criminal forfeiture. Simultaneously, the government filed this action under 18 U.S.C. 1345, and the United States District Court for the Southern District of Florida entered a temporary restraining order barring petitioner from dissipating assets up to the amount of proceeds obtained from the charged offenses. Following a hearing, the court converted the temporary order into a preliminary injunction. Pet. App. 4-34. The court of appeals affirmed. *Id.* at 1-3.

A. Statutory Background

1. Section 1345 of Title 18 authorizes the Attorney General to commence a civil action against a person who is "committing or about to commit" specified offenses, 18 U.S.C. 1345(a)(1), or against a person who "is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation * * * or a Federal health care offense or property which is traceable to such violation," 18 U.S.C. 1345(a)(2); see 18 U.S.C. 24(a) (defining "Federal health care offense").

Section 1345(a)(2) provides that the government may bring an action "(A) to enjoin such alienation" or "(B) for a restraining order" that bars "any person from withdrawing, transferring, removing, dissipating, or disposing of any such property *or property of equivalent value*." 18 U.S.C. 1345(a)(2) (emphasis added). Those provisions ensure preservation of assets that a criminal court may later order the defendant to forfeit or to provide to victims as restitution.

When the government brings an action "to enjoin" or "for a restraining order," 18 U.S.C. 1345(a)(2), "[t]he court shall proceed as soon as practicable to the hearing and determination of such an action," 18 U.S.C. 1345(b). At "any time before final determination," the court "may * * * enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought." *Ibid.*

A proceeding under Section 1345 "is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure." 18 U.S.C. 1345(b). "A permanent or temporary injunction or restraining order shall be granted without bond." 18 U.S.C. 1345(a)(3).

2. a. Criminal forfeitures are imposed as "a punishment for past criminal conduct." *Alexander* v. *United States*, 509 U.S. 544, 553 (1993). In contrast to "historic *in rem* forfeitures of guilty property," criminal forfeitures operate "*in personam*." *United States* v. *Bajakajian*, 524 U.S. 321, 332 (1998). Such *in personam* forfeitures are "an aspect of punishment imposed following conviction of a substantive criminal offense." *Libretti* v. *United States*, 516 U.S. 29, 39 (1995). The forfeited funds are used "to recompense victims of crime, improve conditions in crime-damaged communities, and support law enforcement activities." *Kaley* v. *United States*, 134 S. Ct. 1090, 1094 (2014).

Section 982 of Title 18 provides that a court "imposing sentence on a person convicted of a Federal health care offense" shall "order the person to forfeit

property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense." 18 U.S.C. 982(a)(7). Section 982 also provides that "[t]he forfeiture of property under this section * * * shall be governed by the provisions of" 21 U.S.C. 853. 18 U.S.C. 982(b)(1); see 28 U.S.C. 2461(c).

Section 853, which requires "forfeit[ure] to the United States" of the proceeds of specified drug offenses (and other property), 21 U.S.C. 853(a)(1)-(2), provides for "[f]orfeiture of substitute property," 21 U.S.C. 853(p). If, "as a result of any act or omission of the defendant," any directly forfeitable property has been transferred or cannot be located, "the court shall order the forfeiture of any other property of the defendant, up to the value of any [otherwise forfeitable] property" that the defendant has hidden or dissipated. 21 U.S.C. 853(p)(1)-(2).

b. When sentencing a defendant who has committed a fraud crime "in which an identifiable victim or victims has suffered a * * * pecuniary loss," a district court is required to order restitution. 18 U.S.C. 3663A(a)(1) and (c); see 18 U.S.C. 3664(f), 3771(a)(6). The restitution order must mandate that the defendant compensate "each victim in the full amount of each victim's losses," without "consideration of the economic circumstances of the defendant." 18 U.S.C. 3664(f)(1)(A). A defendant "is not entitled to offset the amount of restitution owed to a victim by the value of property forfeited to the government, or vice versa." *United States* v. *Joseph*, 743 F.3d 1350, 1354 (11th Cir. 2014) (per curiam).

B. The Present Controversy

1. On October 2, 2012, a grand jury charged petitioner and two co-defendants with conspiracy to commit health care fraud, in violation of 18 U.S.C. 1349; conspiracy to pay kickbacks in contravention of Medicare rules, in violation of 18 U.S.C. 371; and paying kickbacks in connection with a federal health care benefit program, in violation of 42 U.S.C. 1320a-7b(b)(2)(A)—all Federal health care offenses under 18 U.S.C. 24(a). See Indictment 7-14 (12-cr-20751 S.D. Fla.). The indictment alleges that those "offenses resulted in $45 million of improper Medicare benefits being paid." Pet. App. 12; see Indictment 9. It seeks forfeiture under 18 U.S.C 982(a)(7) of property "derived * * * from gross proceeds traceable to the commission of the offense" or—if the traceable assets have been dissipated—of substitute assets of equivalent value. Indictment 14-16; see 12-cr-20751 Docket entry Nos. 88, 162.

Petitioner has not yet been arraigned. See, *e.g.*, 12-cr-20751 Docket entry Nos. 91-92, 127.[1] The district court initially ordered petitioner detained and confined, see 18 U.S.C. 3142(e)-(g) and (i), finding a risk of flight based on her possession of multiple foreign passports, her large number of foreign trips, her extensive and scattered property holdings (including property abroad), the "extraordinary sums of money from Medicare" received by petitioner and her family members "during the period of allegedly fraudulent

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[1] Petitioner's co-defendants have cooperated, pleaded guilty, and been sentenced. See 12-cr-20751 Docket entry Nos. 149, 158, 212. The district court ordered one of them to pay $27 million in restitution and the other to pay $45 million in restitution. See *id.* No. 158, at 5; *id.* No. 212, at 5.

activity," and repeated transfers of money and property among that group, 12-cr-20751 Docket entry No. 37, at 2-4; see *id.* No. 52, at 10-23, 32-35, 51-53. The court later released petitioner to home confinement, where she remains. See *id.* Nos. 107, 109-110, 144.

2. a. On the same day the grand jury returned the indictment, the government filed this civil action under Section 1345 seeking to enjoin petitioner from committing further acts of health care fraud, to restrain her from dissipating assets, and to obtain disgorgement, restitution, and an accounting. See J.A. 29-30. The government simultaneously filed a motion for a temporary restraining order, explaining that it had "identified losses to federal health care programs of over $45 million stemming from a scheme, implemented through an elaborate web of kickbacks, to submit fraudulent claims for home health services." 12-cv-23588 Docket entry (Docket entry) No. 4, at 1.

In support, the government submitted a declaration from FBI Special Agent Clint Warren explaining—based on his investigation and the statements of eight unnamed cooperating witnesses, many of whom worked with petitioner—the details of the fraudulent scheme. See J.A. 32-33, 39-41. Petitioner and her co-defendants owned and operated two home health care agencies, LTC Professional Consultants, Inc., and Professional Home Care Solutions, Inc., which allegedly provided physical therapy and served diabetic patients entitled to daily home visits to receive insulin injections. See J.A. 33, 39-41. Each of those agencies was an enrolled health care provider with Medicare, see J.A. 40-41, which prohibits payment of kickbacks or referral fees, see 42 U.S.C. 1320a-7b(b)(2)(A); 42 C.F.R. 1001.1 *et seq.* Agent

Warren's declaration stated that, despite that prohibition, petitioner had paid kickbacks to nurses who falsified blood sugar readings, patient visit logs, and treatment notes; to recruiters who sought out Medicare beneficiaries who were not in need of home visits; and to beneficiaries who allowed petitioner to use their information to bill Medicare. See J.A. 41-49.

Agent Warren's declaration also detailed the dissipation of the fruits of the scheme. From 2006 to 2012, petitioner's companies received $45 million from Medicare, of which petitioner paid herself approximately $4.49 million. See J.A. 50. But only "a fraction" of the money could be located by Agent Warren, who stated that petitioner "used Medicare monies for foreign travel," to "purchase multiple properties," for "luxury cars" and "personal luxury items," and for payment of kickbacks. J.A. 50-51; see J.A. 50 ("shell companies" used).

b. On October 3, 2012, the district court entered a temporary restraining order preventing petitioner and those acting in concert with her from alienating or dissipating proceeds from "Federal health care offenses or property of an equivalent value" of such proceeds. J.A. 56–64. The order listed more than 30 bank accounts and more than ten properties that petitioner controlled or owned. See J.A. 58-61; see also, *e.g.*, J.A. 65-70 (amending order).

Petitioner moved to release funds from the temporary restraining order to pay her attorney in the criminal case. See Docket entry No. 46, at 1-3. While that motion was under consideration, and at petitioner's urging, the district court extended the order on numerous occasions, eventually appointing a receiver to

oversee some of the restrained property. See, *e.g.*, *id.* Nos. 57, 60.

Meanwhile, Agent Warren filed two supplemental affidavits. In the first affidavit, he explained that petitioner transferred money obtained from Medicare to family members and companies they owned, including almost $1.5 million to her husband and more than $1.6 million to her children and other family members; that she took 35 trips to foreign countries in the relevant time period; that she "transferred Medicare monies overseas * * * to Mexico," where she has holdings; and that she used $250,000 to purchase jewelry. J.A. 72-74. He also explained that the United States had traced Medicare proceeds into every bank account owned by petitioner listed in the temporary restraining order as well as into "the purchase or maintenance" of multiple properties. J.A. 74-75; see J.A. 153-157. In the second affidavit, Agent Warren discussed a new cooperating witness who stated that "about 90%" of the purported patients of both of petitioner's agencies received kickbacks. J.A. 80. He also noted cash withdrawals of over $1 million from a single LTC account, identifying "at least two occasions" when petitioner and multiple family members "within minutes of each other[] all cashed checks" drawn from that account for "$10,000 or just below that amount." *Ibid.*; see J.A. 82-83 (withdrawals chart).

c. The government produced to petitioner reports of interviews by government agents of the cooperating witnesses. See, *e.g.*, Docket entry No. 90, at 3. With the district court's approval, the government redacted the reports to remove identifying information. See, *e.g.*, *id.* at 3, 6-10. In addition, the government produced to petitioner in the criminal case all required

discovery, and petitioner was permitted (in both cases) to subpoena medical records. See *id.* at 3; see also *id.* No. 67, at 8-14; *id.* No. 97.

Petitioner proposed to present large quantities of evidence at an evidentiary hearing in the civil case, all of which related to whether the services that petitioner's agencies allegedly rendered were medically necessary. See Docket entry No. 71, at 1 (evidence included "documents from over 200 doctors, over 400 nurses, physical therapists, or aides, and over 20 laboratories") (emphasis omitted). The district court rejected that plan. The court ruled that if the government sufficiently established at a hearing that petitioner had given kickbacks to patients, then the amount that Medicare paid for the care of those patients was necessarily a result of fraud. See, *e.g.*, *id.* No. 87, at 15-20, 37-43. On that basis, the court decided that the only evidence relating to criminal activity that would be permitted at the hearing was evidence relating to kickbacks—although, if the government failed to meet its burden on that issue, an additional hearing on medical necessity would be needed. See, *e.g.*, J.A. 115; Docket entry No. 67, at 12-13; *id.* No. 71, at 6 n.3; *id.* No. 87, at 32, 42-43.

d. On February 6, 2013—before this Court's 2014 decision in *Kaley*—the district court held the evidentiary hearing. See J.A. 84-193. Agent Warren provided his declarations and testified, explaining (among other things) that petitioner and her family members received millions from Medicare fraud; that petitioner had opened and closed well over 40 bank accounts; and that she had withdrawn large amounts of cash to pay kickbacks and hide the proceeds of her scheme. See J.A. 168-174; see also J.A. 155 ("You can't trace

cash"). Agent Warren was also cross-examined at length, with particular emphasis on the cooperating witnesses' credibility and motives to lie. See J.A. 104-151. Petitioner deduced all of their names but one before the hearing, and the government confirmed that those deductions were correct. See J.A. 106-107; see also J.A. 113-118.

The parties stipulated for purposes of the hearing that "an unquantified amount of revenue not connected to the indictment flowed into some of the accounts and some of the real estate" that had been restrained. J.A. 161; see J.A. 159. Petitioner's counsel submitted a compilation of computer records from petitioner's businesses purporting to show $15 million in revenue from sources other than Medicare. See J.A. 161-162. But the government stated that it had not had an opportunity to look at the document and reserved the right to challenge that amount—and Agent Warren said, when asked, that analysis of information reflected in the document was not yet complete. See J.A. 162; see also J.A. 153.[2]

Petitioner did not otherwise present evidence. In particular, she did not submit evidence about what fees her chosen counsel would charge to represent her in the criminal case, although counsel asserted that the fees would be comparable to the hundreds of thousands of dollars he requested to be paid in *Kaley*. See Docket entry No. 53, at 3 n.3.[3]

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[2] In light of the district court's legal rulings, the government had no need to revisit the issue of the $15 million number below. It therefore remains open. See J.A. 179-181; Docket entry No. 87, at 58-59.

[3] The record is also not clear on whether petitioner might be able to call on family members or others to help pay for criminal

3. a. The district court converted the temporary restraining order into a preliminary injunction and denied petitioner's request to release assets to pay for counsel. Pet. App. 5-8, 34.

The district court stated that to obtain a preliminary injunction under Section 1345, the government must show probable cause that "a Federal health care offense has been committed"; that the defendant obtained a certain "amount of proceeds * * * from the criminal activity"; and "that there has been dissipation of assets received as a result of the criminal activity." Pet. App. 9-11. Thus, "when some of the assets that were obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead." *Id.* at 10. Relying in part on the grand jury's probable-cause finding and in part on the information supplied by Agent Warren, the court found that the government had met its burden. See *id.* at 14-15. As to the existence of fraud, the court found that "[f]ederal health care offenses have been committed" and that "$45 million was obtained illegally as a result of those offenses." *Id.* at 13-16; see *id.* at 25-27. As to the dissipation of assets, the court found that petitioner "transferred monies from LTC and Professional" to herself, "directly and by the use of shell corporations that were owned by [her] family members," and that she used the over $4 million she obtained "to purchase luxury items, real estate, [and] automobiles" and "to travel." *Id.* at 13-14; see *id.* at 15 ("only a fraction of the assets" paid by Medicare "could be located").

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representation. See Docket entry No. 87, at 62; *id.* No. 58, at 20 n.4; 12-cr-20751 Docket entry No. 52, at 45-47.

The district court also found that even under a preponderance-of-the-evidence standard, the government had "carried its burden of proof to enter an injunction restraining at least $40.5 million dollars." Pet. App. 15 n.3. That amount far exceeds the assets in petitioner's possession. See J.A. 179 (petitioner had about $2 million in assets in the United States); Docket entry No. 87, at 33.

Finally, the district court declined to release funds to pay criminal counsel. The court agreed with the Fourth Circuit that "no Sixth Amendment impediment" prevents the restraint of "substitute assets" so long as those assets are forfeitable by statute. Pet. App. 31 (citing *In re Billman*, 915 F.2d 916, 921-922 (4th Cir. 1990), cert. denied, 500 U.S. 952 (1991)). The court concluded that such a rule was "common sense": if a bank robber indicted for stealing $100,000 may not use that forfeitable money to hire criminal counsel, despite protesting his innocence, then a bank robber who has "spent the $100,000 that he stole" but "just so happens" to have "another $100,000 that he obtained legitimately" is not entitled to spend that forfeitable money either, lest the amount stolen never be "available for return." *Id.* at 31-32. The court added that petitioner "was represented throughout the [Section] 1345 proceedings by competent counsel" and "will be appointed counsel if she cannot afford [criminal] representation." *Id.* at 33.

b. The court of appeals affirmed, per curiam. Pet. App. 1-3. The court explained that "[t]he district court conducted an evidentiary hearing * * * and found, based on the hearing and the indictment, that there was probable cause to believe that [petitioner] committed an offense requiring forfeiture, that she

possessed forfeitable assets, and that she was alienating those assets." *Id.* at 3. In light of those findings, the Eleventh Circuit ruled that petitioner's Sixth Amendment challenge was "foreclosed" by *Kaley, Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, 491 U.S. 600 (1989). Pet. App. 3; see *id.* at 2-3 (citing *United States* v. *DBB, Inc.*, 180 F.3d 1277, 1283-1284 (11th Cir. 1999), which held that Section 1345 permits preliminary injunction restraining "'property of equivalent value' to that actually traceable to the alleged fraud").

SUMMARY OF ARGUMENT

A. Petitioner's assets were validly restrained under 18 U.S.C. 1345. Section 1345(a)(2)(B)(i) authorizes a court to enter a restraining order for assets of "equivalent value" to assets obtained from a federal health care offense when the government establishes that a person is alienating or disposing of such assets. Contrary to petitioner's contention (advanced for the first time in her merits brief, as a purported means of avoiding a constitutional issue), a "restraining order" is not limited to the brief period before a hearing on the government's complaint. In contrast to the "temporary restraining order" authorized under Federal Rule of Civil Procedure 65(b), the "restraining order" authorized by Section 1345 is one of the ultimate forms of relief the government may seek in order to preserve assets. Moreover, the statute specifically authorizes a "permanent or temporary * * * restraining order," and it permits such relief "at any time before final determination"—refuting petitioner's suggestion that the order can last only until a hearing.

Interpreting Section 1345 to permit only a brief, temporary restraint of property "of equivalent value" when a person is dissipating directly forfeitable property as well as other assets would frustrate Section 1345's purpose. The government may forfeit substitute assets when the defendant has placed directly forfeitable property out of reach. But if the person is free to dissipate such property after a Section 1345 hearing, nothing may be left to forfeit, or to compensate victims, upon conviction.

Allowing a restraining order to last past the hearing does not render other portions of the statute superfluous. Nor does it violate limitations on common law equitable powers identified in this Court's cases. Congress may, and has, provided for an asset freeze broad enough to achieve its purposes, covering equivalently valued property to that obtained from crime.

B. The restraint of substitute assets under Section 1345 is consistent with the Sixth Amendment. This Court's decisions in *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), and *United States* v. *Monsanto*, 491 U.S. 600 (1989), establish that a convicted defendant has no constitutional right to use assets subject to forfeiture to pay counsel for her defense and that a pretrial restraining order to preserve those assets pending trial is similarly valid when the court finds "probable cause to believe that the assets are forfeitable," *id.* at 615. Those cases involved directly forfeitable proceeds of crime, rather than substitute assets subject to forfeiture because the proceeds have been dissipated. But neither the holdings nor rationales of those cases are so limited.

Petitioner argues that the "relation back" principle justifies the freeze of assets traceable to the offense

because such assets are not the defendant's at all, and she contrasts that with untainted substitute assets, which, she notes, are forfeitable only upon conviction. But *Monsanto* did not rely on the "relation back" principle in deeming an asset freeze constitutional. For sound reason: that principle does not give the government ownership rights until the defendant is convicted. Until then, it provides only a potential for forfeiture—the same as with substitute assets that become forfeitable upon conviction if directly forfeitable assets are dissipated.

Equally fundamental, the justification for criminal forfeiture is not that the property is guilty or tainted; it is, rather, to impose *in personam* punishment for commission of an offense. The measure of punishment is tied to the property obtained from or involved in the offense. But the punishment equally applies whether the defendant has retained the directly forfeitable assets, or has dissipated them and retains other sources of wealth. That is why substitute assets are forfeitable. Freezing substitute assets serves the same purpose as freezing directly forfeitable assets. It would make no sense, and would give rise to absurd results, if a defendant could dissipate her proceeds of crime, while retaining other assets, and then immunize herself from a properly substantiated asset freeze under *Monsanto*.

Allowing the defendant to pay counsel of choice with potentially forfeitable substitute assets is no more essential to the integrity of the criminal justice system than allowing her to use directly forfeitable assets to do so. Rather, the balance of interests is the same: given an adequate showing that the government is likely to prevail at trial, it will have a right to

forfeiture, and the defendant's Sixth Amendment interests in hiring counsel of choice do not outweigh the public's and victims' interests in preserving forfeitable assets.

C. The hearing in this case to support the asset freeze complied with due process.

That issue was neither posed nor fairly included in the question presented in the petition, and it is not properly before the Court. Regardless, *Monsanto* established that probable cause that the defendant committed a crime justifies pretrial restraint, and *Kaley* v. *United States*, 134 S. Ct. 1090 (2014), held that a grand jury's finding of probable cause is conclusive at a pretrial asset-seizure hearing. The grand jury's finding here also extended to the amount of proceeds obtained from the crime, and no further hearing was required on that issue. On the issues of dissipation and the amount of substitute assets to be frozen, a probable cause standard is likewise constitutionally sufficient. Since the grand jury did not determine those issues, which lie outside its core function, a hearing on them is warranted. But the government presented evidence, and the district court found, that probable cause (indeed, a preponderance of the evidence) supported the restraint.

Petitioner's claim of a due process right to confront witnesses in this civil proceeding relies on inapplicable Confrontation Clause precedents. And even in criminal cases, longstanding holdings allow use of hearsay statements in similar preliminary proceedings.

ARGUMENT

PETITIONER'S SUBSTITUTE ASSETS WERE VALIDLY RESTRAINED TO ENSURE THEIR AVAILABILITY FOR FORFEITURE AND RESTITUTION

After petitioner was indicted for criminal health-care violations from which she amassed, and dissipated, many millions of dollars in improper Medicare payments, the district court restrained the dissipation of assets that are of equivalent value to funds that petitioner obtained from the charged crimes. Petitioner argues that the restraining order was not authorized by 18 U.S.C. 1345; that the restraint of assets not obtained from criminal violations, although forfeitable as substitute assets, violates her Sixth Amendment right to pay her counsel of choice; and that the procedures used to impose the restraint violated due process. None of those arguments has merit.

A. Section 1345 Authorizes The Restraint Of "Property Of Equivalent Value" Pending The Outcome Of A Criminal Case

Petitioner does not dispute that Section 1345 authorizes a "restraining order" preventing dissipation of assets of "equivalent value" to those that were "obtained as a result of" criminal activity but that are being disposed of or alienated. 18 U.S.C. 1345. For the first time in this Court, however, she argues (Br. 33-41) that Section 1345 authorizes only a temporary restraining order, which may not extend past the date of an evidentiary hearing. According to petitioner (Br. 33-34), that interpretation is justified to avoid constitutional questions. But the "canon of constitutional avoidance comes into play only when * * * the statute is found to be susceptible of more than one

construction," *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005), and Section 1345 is not susceptible to petitioner's strained reading. Accordingly, the avoidance canon "has no role to play," *Warger* v. *Shauers*, 135 S. Ct. 521, 529 (2014).[4]

1. In Section 1345, "Congress used the phrase 'restraining order'" to encompass "all forms of injunctive relief," *United States* v. *DBB, Inc.*, 180 F.3d 1277, 1285 (11th Cir. 1999), including an order to preserve assets pending the outcome of a parallel criminal case. That conclusion flows from Section 1345's text, structure, and purpose.

In contrast to Federal Rule of Civil Procedure 65(b) (Pet. Br. 35), Section 1345 does not mention a "temporary restraining order"—even though the word "temporary" appears twice in that provision. Fed. R. Civ. P. 65(b) (providing for brief entry of "temporary restraining order" (TRO) until "hearing" on preliminary injunction motion); 18 U.S.C. 1345(a)(2)(B)(ii) and (3). While "restraining order" may sometimes be shorthand for the limited-duration order that Rule 65(b) describes, see Pet. Br. 35, the term standing

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[4] Petitioner did not raise her current statutory argument in the district court or the court of appeals, neither of which addressed it. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam); see also J.A. 92. Nor did she raise it in her certiorari petition. Rather, her petition stated that "[t]he statute under review explicitly authorizes district courts to restrain property traceable to the alleged fraud, as well as 'property of equivalent value,'" thus "properly fram[ing]" the "constitutional issue." Pet. 29-30. Nevertheless, because this Court has discretion to consider an unpreserved statutory interpretation issue that is a predicate to a constitutional question, see *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 55-57 (2006); see also Sup. Ct. R. 14.1, this brief addresses it.

alone has a broader meaning, encompassing any "court order entered to prevent the dissipation or loss of property." *Black's Law Dictionary* 1429 (9th ed. 2009); see *DBB*, 180 F.3d at 1282 (citing 1981 dictionary definition). This Court has used "restraining order" in that broader fashion numerous times, including in cases that predate the enactment of Section 1345(a)(2) in 1990 (Pub. L. No. 101–647, § 2521(b)(2), 104 Stat. 4865). See, *e.g.*, *United States* v. *Monsanto*, 491 U.S. 600, 603-604, 612-615 (1989) (discussing 21 U.S.C. 853(e), which refers separately to a "restraining order" and a "temporary restraining order"); *Kelo* v. *City of New London*, 545 U.S. 469, 475 (2005) (referring to a "permanent restraining order" prohibiting taking of property).

"[R]estraining order" necessarily carries that broader meaning in Section 1345. First, Section 1345(a)(2) permits the government to bring "a civil action" either "to enjoin" certain acts "*or* * * * for a restraining order." 18 U.S.C. 1345(a)(2)(A) and (B) (emphasis added). It thus authorizes pursuit of the restraining order described in Section 1345(a)(2)(B) as ultimate relief in an action rather than a mere interim measure. A district court must proceed "to the hearing and determination of such an action," just as it must in an action seeking the injunctive relief described in Section 1345(a)(2)(A). 18 U.S.C. 1345(b). But the hearing cannot mark the last moment that a restraining order may remain in place, because the propriety of such an order may be the final "determination" the government seeks.

Second, Section 1345(a)(3) provides that a "restraining order" may be more than a temporary measure by stating that "*[a] permanent or temporary*

injunction or *restraining order* shall be granted without bond." 18 U.S.C. 1345(a)(3) (emphasis added). The phrase "permanent or temporary" modifies both "injunction" and "restraining order"—the two categories of relief separately authorized in the preceding subsection—because "restraining order" is not preceded by its own article (or by a different modifier). Had Congress wanted "permanent or temporary" to modify only "injunction," it would have referred to "a permanent or temporary injunction or *a* restraining order." See, *e.g.*, *The American Heritage Book of English Usage* 53 (1996) ("[I]f you set up a series of nouns with the first modified by an adjective, the reader will expect the adjective to modify the rest of the series as well. * * * If you want to restrict a modifier to only one noun, repeat the article for each noun."); see also *Washington Educ. Ass'n* v. *National Right to Work Legal Def.*, 187 Fed. Appx. 681, 682 (9th Cir. 2006). If a "restraining order" can endure past final judgment, it does not automatically dissolve when an evidentiary hearing is held.

Third, Section 1345(b) makes clear that a "restraining order" may extend beyond the hearing. Under Section 1345(b), the court is to "proceed" to "the hearing and determination" of an action and "may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury." 18 U.S.C. 1345(b).[5] That power extends to any period of time between "the hearing" and the "final determination"—and so the "restraining order"

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[5] Section 1345(b), which petitioner ignores, independently supports the restraining order in this case, which was entered before final determination.

may come after the hearing itself. *Ibid.* The broad use of "restraining order" in Section 1345(b) suggests a similarly broad meaning for the same term in Section 1345(a)(2)(B). See *Robers* v. *United States*, 134 S. Ct. 1854, 1857 (2014).

Finally, restricting the "restraining order" authorized in Section 1345(a)(2) to the scope of a Rule 65(b) TRO conflicts with the provision's purpose. Congress enacted Section 1345(a)(2) in response to the savings and loan scandals of the 1980s, to "expand[] * * * the remedy that can be obtained" under Section 1345, H.R. Rep. No. 681, 101st Cong., 2d Sess. Pt. 1, at 178 (1990), and ensure "recover[y of] funds from the S&L wrong-doers," 136 Cong. Rec. 36,926 (1990) (Statement of Rep. Fish); see, *e.g.*, 136 Cong. Rec. at 36,929 (Statement of Rep. Schumer) ("We provide for prejudgment attachment and [as]set freezes. You do not want the savings and loan crooks to abscond and escape with their money. This bill will stop it.").[5]

Limiting a Section 1345(a)(2)(B) restraining order to only a brief period would frustrate that purpose. Such a rule would allow the court to preliminarily enjoin only alienation or disposition of criminally obtained property by the defendant himself, and not transfer or dissipation of the property by "any person" with access to it (such as a signatory on an account). Compare 18 U.S.C. 1345(a)(2)(A) with 18 U.S.C. 1345(a)(2)(B)(i). It would bar use of a receiver to oversee property that the defendant was preliminarily enjoined from alienating, although a receiver may be necessary to ensure that property maintains its value. See 18 U.S.C. 1345(a)(2)(B)(ii). And it

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[5] A 1996 amendment made the provision applicable to health-care fraud as well. See Pub. L. No. 104–191, § 247, 110 Stat. 2018.

would allow a defendant who dissipated or sequestered most of his criminal proceeds before the Section 1345 suit commenced to dissipate any "property of equivalent value" as soon as an evidentiary hearing was held, thus preventing the government from obtaining an authorized forfeiture of substitute assets and his victims from obtaining recompense. That cannot be what Congress intended in tightening the net around the perpetrators of serious financial fraud. See *DBB*, 180 F.3d at 1283.

2. a. Petitioner contends (Br. 37) that reading "restraining order" to allow more than temporary relief would render Section 1345(a)(2)(A) superfluous, because Section 1345(a)(2)(B) would authorize all of the relief that the preceding subsection permits.[7] But on petitioner's own reading of the statute, Section 1345(a)(2)(B) would authorize only temporary restraining orders barring certain specific injurious actions, and it would thus be entirely swallowed by Section 1345(b), which authorizes any restraining order entered before "final determination" that "is warranted to prevent a continuing and substantial injury." 18 U.S.C. 1345(b). The canon against superfluity "assists only where a competing interpretation gives effect 'to every clause and word of a statute,'" *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2248 (2011) (citations and internal quotation marks omitted), which petitioner's interpretation does not. Rather, the relevant tenet here is that a certain amount of "overlap reflects the broad purpose" of the statute. *Babbitt* v. *Sweet Home Chapter of Cmtys. for*

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[7] The only case petitioner cites to support her view (Br. 35) adverts to the issue only in a single conclusory sentence in a footnote. *United States* v. *Cohen*, 152 F.3d 321, 324 n.4 (4th Cir. 1998).

a Great Or., 515 U.S. 687, 698 n.11, 703 (1995); see *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004) ("[O]ur preference for avoiding surplusage constructions is not absolute. * * * We should prefer the plain meaning.").

In any event, Section 1345(a)(2)(A) and Section 1345(a)(2)(B) have different functions. Section 1345(a)(2)(A) allows injunctive relief only against the defendant to prevent "alienation or disposition" of criminally obtained property (or traceable property). In contrast, Section 1345(a)(2)(B) authorizes an order restraining "any person" from taking actions that may affect criminally obtained property or "property of equivalent value"—and thus may reach property no longer in the defendant's hands, as well as substitute assets that remain.[8]

b. Petitioner contends that Section 1345 should be read to embody the principle applied in *Grupo Mexicano de Desarrollo, S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), and *De Beers Consolidated Mines, Ltd.* v. *United States*, 325 U.S. 212 (1945), that federal courts lack "inherent, equitable power to dispossess an owner of her rightful assets to secure a

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[8] Amicus Americans for Forfeiture Reform advances a different reading: that Section 1345(a)(2)(B)'s authorization to restrain "property of equivalent value" cannot be used to restrain substitute assets once criminally obtained (or traceable) property has been dissipated. Amicus Br. 3-4, 6, 19-20. That argument is wrong. If a defendant has been disposing of $1000 a week for three weeks before the Section 1345 action is filed and is likely to continue to do so, the defendant is engaged in an ongoing pattern of alienation or disposition, and the initial $3000 is part of the property that the defendant "is alienating or disposing of" under Section 1345(a)(2)(B).

potential future judgment for legal damages." Pet. Br. 38. That principle has no relevance here.

The limitation described in those cases constrains only district courts' inherent equitable powers and does not apply when a statute expressly authorizes the government to obtain an injunction for some specified end. See *Grupo Mexicano*, 527 U.S. at 317, 326 n.8 (citing *De Beers*, 325 U.S. at 219); see also, *e.g.*, *In re Dow Corning Corp.*, 280 F.3d 648, 657-658 (6th Cir.), cert. denied, 537 U.S. 816 (2002); *Gucci Am., Inc.* v. *Weixing Li*, 768 F.3d 122, 131 n.11 (2d Cir. 2014). *Grupo Mexicano* expressly distinguished a case in which assets were frozen under a statute similar to (although more generally worded than) Section 1345.

In *United States* v. *First National City Bank*, 379 U.S. 378 (1965), a tax case, this Court approved a preliminary injunction "preventing a third-party bank from transferring any of the taxpayer's assets which were held in a foreign branch office of the bank." *Grupo Mexicano*, 527 U.S. at 325. *Grupo Mexicano* explained that the asset freeze in *First National* was proper because "it involved not the Court's general equitable powers under the Judiciary Act of 1789, but its powers under the statute authorizing issuance of tax injunctions." *Id.* at 325-326; see *id.* at 325 (explaining that the tax-related statute gave "district courts the power to grant injunctions necessary or appropriate for the enforcement of the internal revenue laws") (citations and internal quotation marks omitted); see also *id.* at 322, 333 (explaining that "Congress is in a much better position than we * * * to design the appropriate remedy"). In addition, *Grupo Mexicano* noted that *First National* involved

"the doctrine that courts of equity will go much farther * * * in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Id.* at 326 (citations and internal quotation marks omitted).

Both of the features that distinguished *First National* from *Grupo Mexicano* are present here. Section 1345 expressly authorizes the district court to enter a restraining order covering "property of equivalent value" or any other restraining order that may be necessary to avoid injury. It also permits only the government, and not a private party, to commence a suit seeking to freeze assets, while noting the centrality of the public interest to a court's decision to grant relief. See 18 U.S.C. 1345(a)(2)(B) and (b). Accordingly, background principles that apply in the absence of legislation have no role to play in this case.[9]

B. Restraining "Property Of Equivalent Value" Under Section 1345 Does Not Violate The Sixth Amendment

Petitioner contends (Br. 17-33) that Section 1345 violates the Sixth Amendment by authorizing restraint of "property of equivalent value" that a defendant needs to hire counsel of choice in a criminal case. That contention lacks merit. This Court has held, in rejecting a Fifth and Sixth Amendment challenge, that "assets in a defendant's possession may be

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[9] Those background principles are also irrelevant when the government seeks equitable relief, such as disgorgement, and requires an asset freeze to ensure the availability of funds at the conclusion of the suit. See *Grupo Mexicano*, 527 U.S. at 324-327; see also, *e.g.*, *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 607, 612 (D.C. Cir. 2000); *SEC* v. *Unifund SAL*, 910 F.2d 1028, 1041-1042 (2d Cir. 1990). The complaint here sought, *inter alia*, disgorgement and restitution. J.A. 29-30.

restrained" before a criminal trial if there is "probable cause to believe that the assets are forfeitable," even if the defendant asserts that those assets are necessary to pay for private criminal representation. *Monsanto*, 491 U.S. at 615. That principle applies here. The assets that a court may freeze under Section 1345, including "property of equivalent value" to criminally obtained property that has been dissipated, are assets that will upon criminal conviction belong to the government via forfeiture. They may also be necessary to satisfy a mandatory restitution order compensating victims of the crimes listed in Section 1345(a)(2) for their losses. The Constitution permits Congress to decide that, when probable cause exists to believe that the defendant will be subject to such a forfeiture, a district court may enter a restraining order to preserve the assets for remedies that will be imposed upon conviction.

1. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. Although representation by counsel of choice is the "root meaning" of the Sixth Amendment, that right "is circumscribed in several important respects." *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144, 147-148 (2006) (quoting *Wheat* v. *United States*, 486 U.S. 153, 159 (1988)). A defendant may not insist on representation by counsel with a conflict of interest that could undermine the proceedings, see *Wheat*, 486 U.S. at 164, or by counsel unable to meet the requirements of the court's docket, see *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983), or by a person who is not a member of the bar, see *Leis* v. *Flynt*, 439 U.S. 438, 441-444 (1979) (per

curiam). Nor does a defendant have a Sixth Amendment right to representation "by an attorney he cannot afford or who for other reasons declines to represent the defendant." *Wheat*, 486 U.S. at 159.

In those situations, the defendant's inability to retain her counsel of choice is the incidental consequence of restrictions that serve legitimate and important public purposes. Where the defendant has been afforded a "fair opportunity" to secure counsel of choice under generally applicable rules, those rules do not result in an "arbitrar[y]" interference with the representation of the defendant by her preferred lawyer. *Powell* v. *Alabama*, 287 U.S. 45, 53, 69 (1932).

2. Applying Sixth Amendment principles, this Court has twice considered whether a defendant is entitled to use forfeitable assets to pay the fees of a criminal lawyer.

a. In *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617 (1989), the Court held that a *convicted* defendant has no entitlement under the Fifth or Sixth Amendment to use assets adjudged forfeitable under 21 U.S.C. 853 to pay the attorney who conducted his criminal defense. See 491 U.S. at 619-620. The Court first observed that "the burden the forfeiture law imposes on a criminal defendant is limited" because "nothing in [Section] 853 prevents a defendant from hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel, * * * hoping that their fees will be paid in the event of acquittal, or via some other means that a defendant might come by in the future." *Id.* at 624-625 (citing *Wheat*, 486 U.S. at 153, 159); see *id.* at 633 n.10 (rejecting argument that such an arrangement would be improper contingency fee). In any event, the Court

concluded, "[a] defendant has no Sixth Amendment right to spend another person's money"—in the case of forfeitable assets, the government's money—"for services rendered by an attorney, even if those funds are the only way that [the] defendant will be able to retain the attorney of his choice." *Id.* at 626; see *id.* at 632 ("We therefore reject petitioner's claim of a Sixth Amendment right of criminal defendants to use assets that are the Government's—assets adjudged forfeitable * * * —to pay attorney's fees."); *id.* at 626 (stating that when a "robbery suspect" wants "to use funds he has stolen from a bank to retain an attorney," the government can "seize[] the robbery proceeds and refuse[] to permit the defendant to use them" in that manner).

In so concluding, the Court relied on several grounds. The Court noted that, after conviction, the "relation-back" provision in Section 853(c) "vest[s] title" to certain forfeitable assets in the United States as of the time of the underlying criminal act. 491 U.S. at 627-628. The Court also stated that if an exception to forfeiture were to be made for the exercise of Sixth Amendment rights, no reason existed why an exception need not be made for exercise of "the right to speak, practice one's religion, or travel," all of which "depend[] in part on one's financial wherewithal." *Id.* at 628. And, most importantly, the Court recognized "a strong governmental interest in obtaining full recovery of all forfeitable assets," which "overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense." *Id.* at 631; see *id.* at 629-630 (noting government interest in using forfeited assets to "return[] property" to fraud victims). If the defendant's inter-

est were deemed paramount, the Court reasoned, "there would be an interference with a defendant's Sixth Amendment rights whenever the Government freezes or takes some property in a defendant's possession before, during, or after a criminal trial," including for collection of unpaid taxes. *Id.* at 631.

b. In *United States* v. *Monsanto*, 491 U.S. 600 (1989), decided on the same day as *Caplin & Drysdale*, the Court considered the constitutionality of an order that "freez[es]" assets "*before* [the defendant] is convicted." *Id.* at 615 (emphasis added); see *id.* at 614. "[B]ased on a finding of probable cause to believe that the assets are forfeitable," the Court concluded, a court may restrain them pretrial consistent with the Fifth and Sixth Amendments. *Id.* at 615. The Court noted that it had "previously permitted the Government to seize property" in civil forfeiture cases (a more "severe" remedy than mere restraint) "based on a finding of probable cause to believe that the property will ultimately be proved forfeitable." *Ibid.* The Court also explained that "it would be odd to conclude that the Government may not restrain property * * * based on a finding of probable cause, when we have held that * * * the Government may restrain *persons*" on such a finding. *Ibid.*

The Court stated that no "departure from [the] established rule of permitting pretrial restraint of assets based on probable cause" was necessary in light of "the nature of the Government's property right in forfeitable assets" or the defendant's planned use of the assets to retain an attorney. 491 U.S. at 616. The Court had already "weigh[ed] * * * these very interests" in *Caplin & Drysdale*, it explained—and given the holding in that case that the government

may after conviction "obtain forfeiture of property that a defendant might have wished to use to pay his attorney," a "pretrial restraining order does not 'arbitrarily' interfere with a defendant's 'fair opportunity' to retain counsel." *Ibid.* (citing *Powell*, 287 U.S. at 53, 69).

3. Both *Caplin & Drysdale* and *Monsanto* involved assets that were the proceeds of a crime rather than "substitute assets," which are forfeitable because the defendant has already dissipated all or some of those proceeds. See 491 U.S. at 619-620; 491 U.S. at 602-603. But in neither decision did the Court limit its holding to cases involving directly forfeitable assets; instead, the Court referred to assets that are "forfeitable," regardless of which specific statutory provision makes them so. 491 U.S. at 619, 632; 491 U.S. at 615-616. And the reasoning underlying *Monsanto*'s approval of a pretrial freeze of assets determined likely to be forfeitable applies fully to substitute assets.

As the district court ruled, to obtain a preliminary restraint of assets under Section 1345 the government must show a sufficient probability that the defendant has committed "a Federal health care offense" (or other qualifying offense), has obtained a specified "amount of proceeds * * * from the criminal activity," and is engaging in "dissipation of assets received as a result of the criminal activity." Pet. App. 10 (citing *United States* v. *Brown*, 988 F.2d 658, 663 (6th Cir. 1993)). Such a showing provides sufficient reason to believe that "property of equivalent value" (18 U.S.C. 1345(a)(2)(B)) to the dissipated assets will be forfeitable under Section 853(p), which requires forfeiture of substitute assets if criminal proceeds have "been transferred or sold" or "cannot be located." 21

U.S.C. 853(p). Moreover, at least when the defendant's gain from the crime also represents loss to the victim, the Section 1345 showing indicates that the defendant is disposing of amounts that will be payable to the victim as restitution at the end of the criminal case. See 18 U.S.C. 3663A, 3664.

Accordingly, all of the reasons given in *Monsanto* for permitting a pretrial asset freeze hold equally true here. If the government prevails in the criminal case, as it has shown at least probable cause to believe it will, then the "property of equivalent value" covered by the Section 1345 restraining order will not belong to the defendant; it will belong to the Attorney General (who may well use it for restitutionary purposes, see *Caplin & Drysdale*, 491 U.S. at 629-630) or to the victim of the crime. The government and the victim thus have a powerful interest in ensuring that those assets will ultimately be available. See *Monsanto*, 491 U.S. at 616 (pretrial restraint of assets "protect[s] the community's interest in full recovery of any ill-gotten gains" upon conviction). The effect of the restraint of "property of equivalent value" on the defendant is "limited," *Caplin & Drysdale*, 491 U.S. at 624-625, because it does not bar her from retaining any attorney willing to represent her without advance payment. And if the restraint is unconstitutional because the defendant wishes to pay a criminal lawyer, then the same reasoning would appear to invalidate a prejudgment tax lien on untainted funds when the defendant claims a need for the funds to pay criminal counsel. For that matter, the defendant could seemingly demand the right to use restrained substitute assets to exercise constitutional rights other than the right to counsel. See *id.* at 628-630.

4. a. Petitioner does not attack *Monsanto* (or *Caplin & Drysdale*), on which this Court recently relied in *Kaley* v. *United States*, 134 S. Ct. 1090, 1096-1097, 1105 (2014). Instead, she accepts *Monsanto* but contends that it is distinguishable. According to petitioner (Br. 20-23, 30), "untainted" assets are special because the government has no property rights in them—whereas in *Monsanto*, she says, the restrained assets were "loot" in which the defendant had no legitimate interest. Absent government property rights in substitute property, she concludes, pretrial restraint is impermissible. That argument rests on a misunderstanding of the nature of criminal forfeiture proceedings.

Initially, petitioner relies on the relation-back principle in 21 U.S.C. 853(c) to explain *Monsanto*, but that principle does not assist her. Section 853(c) provides that "[a]ll right, title, and interest in property described in subsection (a) of this section"—that is, proceeds of the crime (or property used in committing it)—"vests in the United States upon the commission of the act giving rise to forfeiture under this section." But the relation-back principle was not mentioned in *Monsanto*'s constitutional analysis of the asset freeze in that case. 491 U.S. at 615-616. For good reason: *Monsanto* upheld a pretrial restraint of assets, and at that time, *before* the criminal case has reached a conclusion, the government does not yet have a vested property interest in the forfeitable assets. *Monsanto*'s rule thus does not turn on relation back.[10]

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[10] Even in *Caplin & Drysdale*, which dealt with assets that had been adjudged forfeitable after the defendant was convicted, relation back was only a factor in the Court's analysis. See 491 U.S. at 627. And whether the relation-back doctrine in Section 853(c)

Under both the statute and common law, until the defendant has actually been found guilty of some "act giving rise to forfeiture," 21 U.S.C. 853(c), the government's rights are potential—rights that might spring into being at some time in the future if a condition is satisfied that does not yet exist. See *Caplin & Drysdale*, 491 U.S. at 627 ("judicial condemnation" is needed to "perfect" title under relation back) (quoting *United States* v. *Stowell*, 133 U.S. 1, 19 (1890)); *United States* v. *92 Buena Vista Ave.*, 507 U.S. 111, 125-129 (1993) (opinion of Stevens, J.) (discussing analogous relation-back provision in 21 U.S.C. 881 and common-law relation-back doctrine); accord *id.* at 131-132 (Scalia, J., concurring in the judgment). If those rights do spring into being, the legal consequence is that they are deemed to reach back to an earlier date. But that does not mean that before the triggering event takes place the government has any established interest in the relevant property.

Monsanto deals with a point in time before the triggering event has occurred—a point when the defendant might yet prevail in the criminal case, so that neither Section 853(c) nor any other criminal forfeiture enforcement mechanism ever comes into play. The "property" interest at stake in the *Monsanto* context, then, is the same property interest at stake in this case: an interest in preserving property that does not yet belong to the government but which there is probable cause to believe ultimately will. In both contexts, the demonstrated potential for the govern-

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applies to substitute assets remains unsettled in the lower courts. Compare, *e.g.*, *United States* v. *McHan*, 345 F.3d 262, 270-272 (4th Cir. 2003), with *United States* v. *Erpenbeck*, 682 F.3d 472, 477-478 (6th Cir. 2012).

ment to prevail and take ownership—not a present property interest—justifies the pretrial restraint.

Petitioner's argument also fails to recognize that the government's interest in the direct proceeds of a crime—the actual dollar bills obtained by the robber or fraudster—is not any more real or worthy of protection than its interest in substitute assets when the direct proceeds have been dissipated. Unlike *in rem* civil forfeiture, which was historically "directed against 'guilty property,' rather than against the offender himself," *United States* v. *Bajakajian*, 524 U.S. 321, 330 (1998), criminal forfeiture is a means of punishing the defendant *personally* for the commission of a crime by depriving her of ill-gotten gains (and, under some statutory schemes, of other property, see, *e.g.*, *Kaley*, 134 S. Ct. at 1095-1096). See *Libretti* v. *United States*, 516 U.S. 29, 39 (1995); *Alexander* v. *United States*, 509 U.S. 544, 553 (1993); see also *United States* v. *Ursery*, 518 U.S. 267, 293-297 (1996) (Kennedy, J., concurring) (contrasting *in rem* and *in personam* forfeiture).

The government's right to obtain forfeiture of the proceeds of the crime thus is not a right that inheres in a particular piece of property because it is "tainted." If a defendant obtained $45 million from a robbery and carefully placed the whole amount in an empty safe in her office, then that money would undoubtedly be forfeitable. But if instead the defendant dissipated $43 million and had only $2 million left in the safe, depriving her of only the $2 million that remained would allow her to benefit significantly from her wrongdoing. See *United States* v. *Hall*, 434 F.3d 42, 59 (1st Cir. 2006). That is why the government is entitled to substitute assets in an amount equivalent

to the dissipation—in the hypothesized case, up to $43 million that the defendant is holding in a different safe and obtained through some unindicted activity. See 21 U.S.C. 853(p) (listing circumstances in which forfeiture of substitute assets is mandatory). And if the defendant does not have substitute assets in an amount sufficient to account for all of the criminal proceeds, the government is entitled to a money judgment against the defendant to cover the missing amount. See, *e.g.*, Fed. R. Crim. P. 32.2(b); *United States* v. *McGinty*, 610 F.3d 1242, 1246 (10th Cir. 2010) (collecting cases); see also Stefan D. Cassella, *Asset Forfeiture Law in the United States* §§ 15-3, at 571, 19-4, at 691-693, 22-2, at 762-763 (2d ed. 2013) (Cassella).[11] Accordingly, by recognizing the basic principle that "[m]oney is fungible," *e.g.*, *Ransom* v. *FIA Card Servs.*, 562 U.S. 61, 79 (2011), the law ensures that "crime does not pay," *Monsanto*, 491 U.S. at 614.[12]

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[11] Along the same lines, in a case involving property loss the federal restitution statutes authorize courts to order a defendant either to return the property or pay an amount equal to its value. 18 U.S.C. 3663A(b)(1).

[12] Petitioner's discussion of historical forms of forfeiture (Br. 23-24) involving different rationales and procedures than those described above is entirely beside the point. As petitioner states, *in personam* forfeiture did not exist in this country until 1970—but it was the very type of forfeiture at issue in *Monsanto*, and it has long been an accepted penalty in criminal cases. Forfeiture of substitute assets is simply a form of *in personam* forfeiture (and cannot be equated with "forfeiture[] of estate," which required a felon to forfeit *all* property to the Crown without regard to the gain realized from, or the loss caused by, his crime, *Austin* v. *United States*, 509 U.S. 602, 612 (1993); see *United States* v. *Grande*, 620 F.2d 1026, 1038 (4th Cir.), cert. denied, 449 U.S. 830, and 449 U.S. 919 (1980)).

Because petitioner misunderstands the nature of forfeiture, she also misunderstands (Br. 21, 30) the import of the robbery hypothetical in *Caplin & Drysdale*. The reason that the robber cannot use his spoils to pay counsel is not that the specific money he took is somehow dirty; it is that the money is "rightfully" the government's as a matter of forfeiture law (assuming the robber is convicted). 491 U.S. at 626; see 21 U.S.C. 853(n) (permitting third party with claim to forfeited property to assert that claim in court). If dissipation of the stolen money is established, then the robber's "untainted" funds, in an amount equivalent to the dissipation, are also rightfully the government's under forfeiture law, and the robber has no more right to those funds than she has to the bag of cash she carried out of the bank. See Pet. App. 32 (district court decision explaining that if a robber spent the money that he stole but "just so happens" to have an equivalent amount of money that "he obtained legitimately," those "substitute, untainted assets" must be "kept available for return" to the victim or for forfeiture).

Against that background, treating "property of equivalent value" differently than directly forfeitable assets, for purposes of a constitutional rule about which pretrial restraining orders are permissible, would give rise to absurd and unfair results. A criminal who uses the proceeds of her crime to pay her day-to-day expenses, thus enabling her to save in a bank account "untainted" money that she would otherwise have spent during the same period, wields "undeserved economic power" when it comes time to hire criminal counsel, *Caplin & Drysdale*, 491 U.S. at 630, to the exact same extent that she would if she had

spent the "untainted" money on the expenses and left the criminal proceeds in the bank. See, *e.g.*, *United States* v. *Casey*, 444 F.3d 1071, 1074 (9th Cir.) (criminal "who dissipates the profits or proceeds" of his crimes for fleeting purposes "has profited from [the crime] to the same extent as if he had put the money in his bank account") (citation omitted), cert. denied, 549 U.S. 1010 (2006). And yet, under petitioner's view, that criminal would be constitutionally entitled to use the "untainted" money to pay for counsel—even though that money will belong to the government (or to her victims) if she is convicted. In contrast, a less wily criminal who segregates the proceeds of her crime in a bank account, while using up all of her remaining funds to cover her living expenses, has—petitioner agrees—no constitutional entitlement to spend the money in the account to pay counsel of her choice to defend her in the criminal case.

Such a constitutional rule would treat similarly situated defendants differently without any justification, while ignoring both the purpose of criminal forfeiture and the rights of victims. See Cassella § 17-14, at 638 (observing that "the victims of the offense," who are "most directly interested" in the government obtaining forfeiture, "have the same interest in having the property preserved regardless of what theory of forfeiture applies"); *id.* § 22-5, at 772 & n.42; see also *United States* v. *Wingerter*, 369 F. Supp. 2d 799, 810 (E.D. Va. 2005). And the only practical consequence of such an approach would be to reward the rapid dissipation of criminal proceeds, see, *e.g.*, *United States* v. *Vampire Nation*, 451 F.3d 189, 202 (3d Cir.), cert. denied, 549 U.S. 970 (2006)—a lesson that the

sophisticated criminals covered by Section 1345(a)(2)(B) will quickly learn.[13]

b. Petitioner's additional arguments in support of her Sixth Amendment claim also lack merit.

i. Petitioner argues (Br. 31-32) that the government made a concession relevant to the question presented here at oral argument in *Kaley*. The Court stated that, at argument, the government "agreed that a defendant has a constitutional right to a hearing" on "whether probable cause exists to believe that the assets" sought to be restrained pretrial "are traceable or otherwise sufficiently related to the crime charged in the indictment"—a matter that the Court described as a "requirement[] for forfeiture." 134 S. Ct. at 1095 & n.3.[14] That statement does not undermine the conclusion that *Monsanto* controls this case.

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[13] The effects of petitioner's proposed constitutional rule could well extend beyond Section 1345. Civil enforcement actions may involve fraudulent schemes that are also the subject of federal criminal charges—and some civil-enforcement statutes authorize prejudgment asset freezes, to preserve assets for defrauded consumers and investors, without requiring the frozen assets to be traced dollar-for-dollar to the underlying unlawful activities. *See, e.g.*, *FTC* v. *Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011); *CFTC* v. *Muller*, 570 F.2d 1296, 1301 (5th Cir. 1978); see also *Caplin & Drysdale*, 491 U.S. at 631-632 (discussing IRS "jeopardy assessments"). Any constitutional requirement that reaches such cases could undermine the government's ability to collect a final judgment from a defendant who was careful to spend the direct proceeds of her unlawful scheme while husbanding her other assets.

[14] See 10/16/13 Tr. at 45, *Kaley*, *supra* (No. 12-464) (Court asks: "in the general run case, so you agree that due process does require a traceability hearing"; government answers: "Yes. The defendants are entitled to show that the assets that are restrained are not actually the proceeds of the charged criminal offense or

In *Kaley*, although the indictment gave notice that the government might claim substitute assets, the pretrial restraining order that the government defended in this Court, which was entered under 21 U.S.C. 853(e), covered only directly forfeitable assets: "proceeds obtained from" or property involved in "the [charged] offense(s) and all property traceable to such property." J.A. at 40, *Kaley*, *supra* (No. 12-464); see *id.* at 44-47, 67-68; *United States* v. *Kaley*, 2007 WL 1831151, at *1-*2 (S.D. Fla. 2007). When assets sought to be frozen pretrial are claimed to be forfeitable on a proceeds or involved-in basis alone, then traceability or other direct relation to the crime is indeed a "requirement[]" that must be met when the defendant shows a need for funds to hire counsel. *Kaley*, 134 S. Ct. at 1095; see *id.* at 1099 n.9; see also *United States* v. *Farmer*, 274 F.3d 800, 801-802, 804 (4th Cir. 2001) (collecting cases).

But traceability is *not* a forfeiture requirement for substitute assets, and the government's statement in *Kaley* did not address the distinct situation in which dissipation of criminal proceeds has been established and a pretrial order restraining substitute assets has been sought. No reason existed for the government to do so, because no substitute-assets restraint was before the Court in that case—consistent with the fact that six out of seven circuits to have considered the issue have ruled that Section 853(e)'s authorization for pretrial restraint of assets as part of a criminal case does not encompass substitute assets. See Cassella § 17-14, at 638-639 & nn.123-124 (noting that Section 853(e) refers to restraint of property "described in

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another way—"; answer was not completed when the Court asked the next question).

subsection (a)" and substitute assets are forfeitable only under subsection (p)).

The situation in this case differs. As the district court correctly recognized, because "property of equivalent value" is alleged to be forfeitable because it stands in for "tainted" property that has been dissipated, and because Section 1345 authorizes pretrial restraint of substitute assets, an inquiry into whether the property to be restrained is itself "tainted" serves no purpose. See J.A. 159 ("substitute properties are just as good as tainted properties"). Instead, under *Monsanto*, the only question for a district court in deciding whether the property may be frozen is whether probable cause exists to believe that it is "forfeitable." 491 U.S. at 615.

ii. Petitioner also contends (*e.g.*, Br. 27-28) that allowing a defendant to pay a member of the private bar is necessary to maintain "the public's confidence in the justice system" and the defendant's own "capacity to trust" her lawyer. But even if petitioner's speculations about how various actors bestow trust and confidence were accurate, the considerations she identifies do not distinguish this case from *Monsanto*. By approving a pretrial freeze of directly forfeitable assets, that decision barred a class of defendants from accessing funds needed to pay for a lawyer of choice—and the Court concluded that such a bar is appropriate upon an adequate showing that the property is forfeitable. 491 U.S. at 615-616.

In any event, petitioner's speculations are unsupported. To the extent that petitioner suggests (*e.g.*, Br. 28-29) that a privately retained criminal lawyer always provides more effective representation than a federal defender or a private lawyer appointed from a

Criminal Justice Act (CJA) panel (see 18 U.S.C. 3006A), the suggestion is unwarranted. See, *e.g.*, Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 Stan. L. Rev. 317, 319, 325-326 & nn.30-31 (2011) (2008 survey of federal judges, who ranked federal public defenders the best of all types of civil and criminal attorneys who appeared before them and considered CJA lawyers and privately retained counsel to provide representation of essentially equal quality); Caroline Wolf Harlow, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* 1 (Nov. 2000) (explaining that federal defendants "with publicly financed or private attorneys had the same conviction rates" (including by plea) and about the same average sentences); see also *Kaley*, 134 S. Ct. at 1102 n.13. And to the extent that petitioner suggests that appointed counsel is unworthy of or unlikely to earn a defendant's respect (Br. 26-28), the suggestion is unjustified. Federal defenders and other appointed counsel vigorously contest the government's positions, and they build client relationships, just as private attorneys do, through their advice and advocacy. Petitioner cites no evidence that clients doubt their "allegiance" on the ground that they are somehow "'public' lawyer[s]." Br. 27.

5. If Congress believed that a defendant like petitioner should always have access to some or all of the property in her hands to pay for an attorney of her choice, it could change the law. "Congress could disapprove of *Monsanto*," *Kaley*, 134 S. Ct. at 1105, or

alter Section 1345 to exclude restraint of "property of equivalent value" under some or all circumstances.[15]

But, as in *Kaley*, the Constitution "does not command those results." 134 S. Ct. at 1105. Congress has authorized pretrial restraint of substitute assets under Section 1345 in cases involving banking law or federal health-care offenses, and the district court in this case therefore refused to release hundreds of thousands of dollars from a restraining order that—because of petitioner's extensive dissipation of assets—captures only a small percentage of the proceeds from the massive fraud alleged in the indictment. The Sixth Amendment does not mandate a different outcome.

C. The Hearing Held In This Case Did Not Violate Petitioner's Procedural Due Process Rights

Petitioner claims (Br. 42-55) that even if the restraint of property of equivalent value is sometimes permissible, it was not permissible here. She asserts that the standard of proof to which the government was held and the use of hearsay at the evidentiary hearing did not comport with the demands of proce-

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[15] While Congress was considering civil forfeiture reform in the late 1990s, the Department of Justice proposed alterations to criminal forfeiture procedures, including a proposed amendment to Section 853(e) that would have expressly permitted pretrial restraint of substitute assets and permitted courts to exempt such assets from restraint if needed to pay attorneys' fees (and some other expenses). See *Civil Asset Forfeiture Reform Act: Hearing Before the House Comm. on the Judiciary*, 104th Cong., 2d. Sess. 166 (1996); see also *id.* at 91 (Department's explanation that "substitute assets" are "untainted assets which may be exempted from forfeiture for certain limited purposes"). That proposal was not enacted.

dural due process. That challenge is not properly before this Court, because it is not fairly included in the scope of the question presented in the petition for certiorari. In any event, the challenge lacks merit. Existing precedent makes clear that the probable-cause standard governs and that hearsay is permissible at a Section 1345 hearing, and petitioner supplies no reason for this Court to depart from that precedent.

1. The procedural due process arguments now raised by petitioner are not "fairly included" in the question presented in the petition. Sup. Ct. R. 14.1(a). That question is "[w]hether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments." Pet. i-ii. Petitioner thus asked this Court to decide only whether such a restraint necessarily violates the Constitution, whatever the procedures employed in imposing it. Determining whether the district court's procedures were adequate is "perhaps complementary to the [question] petitioner[] presented," but raises a separate issue that "would not assist in resolving" that question. *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992) (emphasis omitted); see, *e.g.*, *Ohio* v. *Robinette*, 519 U.S. 33, 38 (1996).

It is true that the question presented mentions the Fifth Amendment. That Amendment is relevant to the categorical question that petitioner actually posed, however. See, *e.g.*, *Monsanto*, 491 U.S. at 614. And, as demonstrated by this Court's decision in *Yee*, *supra*, the mere mention of a particular constitutional provision in the question presented does not sweep

any argument arising under that provision within the ambit of the question. See 503 U.S. at 537 (explaining that reference in question presented to takings "under the fifth and fourteenth amendments" did not encompass issue of whether regulatory taking occurred because the question and petition focused on distinct issue of physical taking). Here, because the petition failed to raise petitioner's procedural arguments, the question presented cannot be "[f]airly construed" to include them. *Ibid.*[16]

By omitting her procedural due process challenge from the petition, petitioner deprived the government of "any opportunity * * * to argue that such [a] question[]" is not "worthy of review." *Yee*, 503 U.S. at 536. Had that opportunity been offered, the government could have noted the absence of any disagreement among the courts of appeals and could have explained that the choice between a probable-cause standard and a preponderance-of-the-evidence standard makes no difference to the outcome of this case (because the district court found that either standard had been satisfied, see Pet. App. 15 & n.3).[17]

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[16] In her petition-stage reply brief, petitioner asserted (at 13 n.4) that she "has challenged, in the alternative," the procedures employed in this case. But she cited only pages of the petition's fact statement, not the reasons for granting the petition. And in any event, discussion in the text of a petition of an issue not subsumed in the question presented does not bring an issue before the Court. See *Wood* v. *Allen*, 558 U.S. 290, 304 (2010).

[17] The district court found that under a preponderance-of-the-evidence standard the government had established that petitioner obtained $40.5 million from fraud and that under a probable-cause standard the government had established that petitioner obtained $45 million. The gap between those numbers makes no practical

2. a. *Monsanto* held that, under the Due Process Clause, "assets in a defendant's possession may be restrained" pretrial under Section 853(e) "based on a finding of probable cause to believe that the assets are forfeitable." 491 U.S. at 614-615. The selection of the probable-cause standard formed a significant part of the Court's analysis and served as the foundation for the Court's conclusion that the restraint before it was constitutional. See *id.* at 615-616.

That holding was reaffirmed and applied in *Kaley*. Use of the probable-cause standard to restrain assets pretrial—which *Kaley* repeatedly described as *Monsanto*'s "holding"—was, in fact, the central premise of *Kaley*, undergirding the conclusion that the grand jury's probable-cause determination as to the commission of a crime was "conclusive" in the asset-restraint context. 134 S. Ct. at 1095, 1099; see *id.* at 1094, 1096-1101. Further, when the *Kaley* Court applied the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), to consider if a broader hearing was warranted, it did not balk at incorporating *Monsanto*'s rule "that a seizure of * * * property is erroneous only if unsupported by probable cause." *Kaley*, 134 S. Ct. at 1001; see *id.* at 1105 (stating that Fifth and Sixth Amendments do not require pretrial seizures of property to be held "to a higher standard than probable cause"); see also *Monsanto*, 491 U.S. at 614, 616 (relying on a "weighing of" the defendant's and the government's "interests").

Because the showing made by the government under Section 1345 is equivalent to a showing that the restrained assets are likely forfeitable, see pp. 30-31,

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difference, because everyone agrees that the total value of petitioner's assets is far less. See p. 12, *supra*.

supra, *Monsanto* and *Kaley* are controlling on the probable-cause question here as well. It would be odd if the Fifth Amendment mandated one standard of proof with respect to directly forfeitable assets and a different standard in Section 1345 cases involving "property of equivalent value," since the "weighing" of interests in each of those contexts, *Monsanto*, 491 U.S. at 616, is so similar. The interests in restraining the property here include not only the government's interest in ensuring that assets are preserved for forfeiture, see *Kaley*, 134 S. Ct. at 1101-1102; U.S. Br. at 40-47, *Kaley*, *supra* (No. 12-464), but also the victim's interest in ensuring that the defendant can satisfy a restitution order. And the defendant's interest is no different than in *Monsanto* or *Kaley*. When a defendant needs assets claimed to be forfeitable to pay his counsel of choice, the strength of his interest in selecting that counsel hardly depends on the particular statutory basis on which the government makes its claim to the assets. After all, a defendant who possesses only property alleged to be directly forfeitable is affected just as strongly by a freeze order as a defendant whose sole property is alleged to be forfeitable as substitute assets. Because the balance of interests does not tip more favorably to the defendant here than in *Monsanto* or *Kaley*, and because the risk of error is no higher here than when dealing with directly forfeitable assets in the Section 853(e) context, the Fifth Amendment does not require a more stringent standard of proof than existing precedent affords. See *Mathews*, 424 U.S. at 343 (noting importance of considering "fairness and reliability of the existing * * * procedures"); Pet. Br. 42-46 (in-

voking *Mathews* test but failing to analyze any of its components).

Examining each of the prerequisites for a Section 1345 restraining order demonstrates the fairness of applying the probable-cause standard—although in cases in which "an indictment has been returned against" the Section 1345 defendant, 18 U.S.C. 1345(b), the force of the indictment in carrying the government's burden in the civil case may vary depending on the issue. As to the question of whether a relevant crime has been committed, all of the considerations discussed in *Monsanto* and *Kaley* are applicable. Reaching a conclusion about the likelihood of guilt under a probable-cause standard is the central function of the grand jury, and the grand jury's determination is sufficiently reliable both to restrain the defendant (as petitioner here has been restrained) and to set a criminal trial in motion. Probable cause is therefore also enough to restrain property that will not belong to the defendant if the government prevails in a criminal case. And where an indictment exists, *Mathews* balancing does not require the court to permit a Section 1345 defendant to second-guess the grand jury's probable-cause assessment—an enterprise that would create significant "dissonance" with the pending criminal case. *Kaley*, 134 S. Ct. 1098-1099, 1101-1105; see *Monsanto*, 491 U.S. at 614-616.

Making a finding about how much money or property the defendant obtained from the criminal activity is part and parcel of assessing whether the defendant has committed a crime, what the nature of the crime was, and how the crime was carried out. A probable-cause standard is therefore just as appropriate on the question of amount as on the question of whether a

crime has occurred. Indictments do not always allege a specific amount of criminal gain; that amount is rarely an *element* of a federal crime, and it is therefore a matter outside "the grand jury's core competence and traditional function." *Kaley*, 134 S. Ct. at 1098 n.9. But where, as here, the grand jury does make such a finding, it has made a "reliable" determination, *id.* at 1098, in the course of examining the defendant's wrongdoing. The merits of that probable-cause determination need not be revisited by the court.

As for dissipation of property obtained from or traceable to a criminal offense, the grand jury will likely have nothing to say on that topic, and it is very far removed from the grand jury's central functions. Accordingly, it is open to the parties to litigate dissipation at a Section 1345 hearing. But the government should not be required to show more than probable cause on that point. At least where restraint of "property of equivalent value" is at issue, 18 U.S.C. 1345(a)(2)(B)(i), dissipation is an integral part of the showing that in the event of a conviction, "the assets" will be "forfeitable." *Monsanto*, 491 U.S. at 614-615. A unitary standard of proof is also most administrable, and petitioner does not argue that the standard should differ among Section 1345's prerequisites.

In any event, applying the usual civil standard for preliminary injunctions in assessing whether the government has adequately established dissipation is unlikely to affect the outcome. That standard would require the government to show a substantial likelihood of proving dissipation by preponderance of the evidence—a test that is quite similar to the probable-cause standard, because it requires less than the pre-

ponderance showing needed ultimately to prevail. See *United States* v. *Fang*, 937 F. Supp. 1186, 1197 (D. Md. 1996); see also *United States* v. *Gordon*, 710 F.3d 1124, 1165-1166 (10th Cir.) (forfeiture under Section 853(p) requires showing by the preponderance of the evidence), cert. denied, 134 S. Ct. 617 (2013). Further, the government's proof of dissipation in a Section 1345 case usually consists (as here) of direct evidence of financial transactions—withdrawals, transfers of property, and the like—involving assets linked to the crime by an accounting analysis. Such proof is sufficient to show *greater* than probable cause to believe that a defendant is "alienating or disposing of property * * * obtained as a result of" a relevant offense. 18 U.S.C. 1345(a)(2).[18]

b. Other than insisting that *Monsanto*'s holding was dicta, petitioner advances (Br. 46-55) only one argument that a probable-cause standard is not sufficiently demanding: that any government interference with a criminal defendant's choice to hire a particular lawyer amounts to a prior restraint on the defendant's speech in violation of the First Amendment. Although a similar argument was made by respondent in *Monsanto*, see Resp. Br. at 34 n.16 (No. 88-454), and by an amicus in *Kaley*, see NACDL Amicus Br. at 10-20

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[18] Petitioner intimates (Br. 44, 54) that a beyond-a-reasonable-doubt standard of proof might be appropriate, but no court has ever accepted that extreme suggestion. See Pet. App. 11; see also *California ex rel. Cooper* v. *Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) (per curiam) (Court "has never required the 'beyond a reasonable doubt' standard to be applied in a civil case"); Cassella § 15-3, at 570. Among other things, it would force the government to try its entire criminal case prematurely in a civil preliminary-injunction hearing. See *Kaley*, 134 S. Ct. at 1098-1102.

(No. 12-464), the Court did not accept it in either case, and it is fatally flawed in multiple respects.

First, as the Court explained in *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985), which rejected constitutional challenges to a $10 cap on the fee payable to an attorney representing a veteran seeking benefits, "numerous conceptual difficulties" stand in the way of establishing the highly "questionable proposition" that individual litigants have a First Amendment right to "pay" a lawyer to act as "their surrogate speaker." *Id.* at 334-335. A particular defendant's desire to hire particular counsel may be dashed by any number of government actions, including a court's admission or conflict-of-interest rules, a judge's decisions on scheduling, see pp. 26-27, *supra*, or the very pretrial freeze of directly forfeitable assets that this Court approved in *Monsanto*. If petitioner were correct (Br. 50) that any "[g]overnment action that has the effect of removing advocates and their arguments from the courtroom constitutes an unconstitutional prior restraint on speech," then no such restrictions would be permissible. It is thus unsurprising that petitioner cannot point to a single case holding that a defendant has the First Amendment right she claims, let alone that a practical bar to obtaining representation brings into play the "special rules" governing a prior restraint. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 65 (1989); cf. *Gentile* v. *State Bar*, 501 U.S. 1030, 1071-1074 (1991).[19]

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[19] All of the cases petitioner cites are readily distinguishable. For instance, *Gentile* is about a lawyer's own free-speech rights in giving a press conference. See 501 U.S. at 1033-1034 (opinion of Kennedy, J.). *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 549 (2001), is about restrictions on which arguments a lawyer obtaining

Indeed, the Court that decided *Fort Wayne Books*, on which petitioner's argument heavily relies (*e.g.*, Br. 46-48), plainly did not think that the First Amendment prior-restraint concepts at issue in that case carried over to cases involving a pretrial freeze of assets that would otherwise be used to pay counsel. That is because *Fort Wayne Books* was decided just four months before *Monsanto*—and the *Monsanto* Court, with *Fort Wayne Books* firmly in mind, held that probable cause was the applicable standard when deciding whether to enter such an asset-freezing order. Compare 489 U.S. 46 with 491 U.S. 600; see *Caplin & Drysdale*, 491 U.S. at 628 ("If defendants have a right to spend forfeitable assets on attorney's fees, why not on exercises of the right to speak?").

Second, the First Amendment adds nothing to a due process analysis in a dispute over a litigation procedure like the standard of proof. See *Walters*, 473 U.S. at 335 (noting that respondents' "First Amendment arguments" were "inseparable from their due process claims" and had "no independent significance"); see also *Caplin & Drysdale*, 491 U.S. at 628 (explaining that no "distinction between, or hierarchy among, constitutional rights" exists in assessing the constitutionality of an asset-freeze order); cf. *Gentile*, 501 U.S. at 1071-1074. Indeed, petitioner herself relies on the due process principle of a "right to be heard." *Powell*, 287 U.S. at 68-69, cited in Br. 49. If a probable-cause standard is sufficient to guarantee due

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certain funds can make. And *Citizens United* v. *FEC*, 558 U.S. 310 (2010), and *McConnell* v. *FEC*, 540 U.S. 93 (2003), are about political speech by citizens in elections. Cf. *Walters*, 473 U.S. at 335 n.13 (distinguishing "the constitutional analysis of a regulation that restricts core political speech").

process to a party facing a pretrial asset freeze, then it is also sufficient to protect that party's interest in "mak[ing] a meaningful presentation" of her views in court. *Walters*, 473 U.S. at 335; see Ronald D. Rotunda & John E. Nowak, 3 *Treatise on Constitutional Law* § 17.10 (2012).

Last, even if the First Amendment were somehow relevant here, a defendant in petitioner's position has not experienced any restriction on her free-speech rights. Although petitioner characterizes (Br. 48) an action under Section 1345 as an attempt to gain "[t]he power to choose an adversary's lawyer," application of a law serving legitimate interests that incidentally restricts a defendant's access to funds to hire counsel does not prevent anyone—including counsel of choice, who may still elect to represent the defendant—from saying anything. See pp. 27-28, 31, *supra* (citing *Caplin & Drysdale*, 491 U.S. at 624-625, 632 n.10). And every defendant, no matter how impecunious, will ultimately have the right to "articulate" her "defenses" (Br. 49) through an effective representative. See *Kaley*, 134 S. Ct. at 1102 n.13.

c. In any event, the standard of proof makes no difference to the outcome in this case, and the Court need not reach the issue. As for dissipation of Medicare proceeds, the government's evidence was direct and overwhelming, and petitioner made no effort to contest it. As for commission of a crime and the amount obtained thereby, the only way in which the district court thought the standard of proof mattered was in determining amount—and since the lower amount the court identified far exceeds petitioner's assets, any difference in standard has no practical

effect on the operation of the restraining order. See p. 44, *supra*.

3. Finally, petitioner briefly argues (Br. 54-55) that as a matter of due process a court "cannot enjoin untainted assets needed to retain criminal counsel based solely on hearsay * * * from unsworn confidential informants." The district court's decision to accept hearsay evidence at the hearing in this case was unremarkable, however, and does not violate petitioner's constitutional rights.

Petitioner points to the Confrontation Clause (Br. 54-55 (citing, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36, 61 (2004))), but that Clause has no application in a Section 1345 case, which Congress has expressly designated a "civil action" (albeit one governed by criminal discovery rules when an indictment has issued). 18 U.S.C. 1345(a); see Amend. VI (setting forth rights available in "criminal prosecutions"). The decision whether to award preliminary injunctive relief in a civil case is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981). Accordingly, it is well established that district courts may rely on affidavits and hearsay evidence at the preliminary-injunction stage. See *Mullins* v. *City of N.Y.*, 626 F.3d 47, 51-52 (2d Cir. 2010) (collecting cases). A district court judge receiving such evidence will understand its nature and can give it whatever weight it warrants. See *ibid.*[20]

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[20] Even in a criminal case, preliminary proceedings do not implicate the right to confrontation. See, *e.g.*, *United States* v. *Raddatz*, 447 U.S. 667, 679 (1980) (in suppression hearings due process does not require avoidance of hearsay or disclosure of identity of confidential informants); Fed. R. Evid. 1101 (Rules of Evidence do not

Nothing about an injunction freezing a defendant's assets mandates a different procedure, regardless of whether the defendant asserts that those assets are necessary to pay counsel. Petitioner appears to concede (Br. 43-44, 54) that when a court is considering a pretrial restraint of directly forfeitable assets in a criminal case under Section 853(e), "[t]he court may receive and consider[] at a hearing * * * evidence and information that would be inadmissible under the Federal Rules of Evidence." 21 U.S.C. 853(e)(3). Petitioner provides no reason why it would be constitutional to consider hearsay evidence at a Section 853(e) hearing involving directly forfeitable assets but unconstitutional to consider such evidence in a Section 1345 hearing involving substitute assets, even if the defendant in each case will be unable to pay counsel of choice without the assets in question.

In this case, the district court's acceptance of hearsay at petitioner's hearing did not result in any unfairness. Acting before this Court's decision in *Kaley*, the district court held a more extensive hearing than necessary. Petitioner was aware of the identity of all but one of the cooperators, see p. 10, *supra*, and she used the hearing to attack their credibility, extracting admissions from Agent Warren that they were cooperating to get a better deal for themselves and that some of them did not initially implicate her, *e.g.*, J.A. 108-112.[21] And the court's factual findings were not

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apply in grand jury proceedings or "miscellaneous proceedings," including proceedings on extradition, search warrants, detention, sentencing, or revocation of supervised release).

[21] Indeed, because petitioner independently deduced the identity of almost all of the cooperators, nothing prevented her from seeking to call them to the stand (so long as their names did not appear

"based solely" on information originating with "unsworn confidential informants" (Br. 54); rather, the court had before it significant other evidence (including financial records and Agent Warren's testimony on matters as to which he had personal knowledge) that corroborated the cooperators' accounts and independently established petitioner's dissipation of assets. See pp. 6-10, *supra*. The Due Process Clause requires no more.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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in the public record). She chose not to do so—presumably reflecting a strategic judgment that their testimony would not prove helpful to her cause. Nor did she exercise her right to put on other witnesses.

APPENDIX

1. 18 U.S.C. 1345 provides:

Injunctions against fraud

(a)(1) If a person is—

(A) violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or any agency thereof), or 1001 of this title;

(B) committing or about to commit a banking law violation (as defined in section 3322(d) of this title); or

(C) committing or about to commit a Federal health care offense;

the Attorney General may commence a civil action in any Federal court to enjoin such violation.

(2) If a person is alienating or disposing of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322(d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court—

(A) to enjoin such alienation or disposition of property; or

(B) for a restraining order to—

(i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of

any such property or property of equivalent value; and

(ii) appoint a temporary receiver to administer such restraining order.

(3) A permanent or temporary injunction or restraining order shall be granted without bond.

(b) The court shall proceed as soon as practicable to the hearing and determination of such an action, and may, at any time before final determination, enter such a restraining order or prohibition, or take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. A proceeding under this section is governed by the Federal Rules of Civil Procedure, except that, if an indictment has been returned against the respondent, discovery is governed by the Federal Rules of Criminal Procedure.

2. 18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. 18 U.S.C. 982 provides in pertinent part:

Criminal forfeiture

* * * * *

(a)(7) The court, in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, real or personal, that constitutes or is derived, directly or indirectly, from gross proceeds traceable to the commission of the offense.

* * * * *

(b)(1) The forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the provisions of section 413 (other than subsection (d) of that section) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853).

(2) The substitution of assets provisions of subsection 413(p) shall not be used to order a defendant to forfeit assets in place of the actual property laundered where such defendant acted merely as an intermediary

who handled but did not retain the property in the course of the money laundering offense unless the defendant, in committing the offense or offenses giving rise to the forfeiture, conducted three or more separate transactions involving a total of $100,000 or more in any twelve month period.

4. 18 U.S.C. 1349 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

5. 21 U.S.C. 853 provides:

Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property"

Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers

All right, title, and interest in property described in subsection (a) of this section vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) of this section that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

(e) Protective orders

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) of this section for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this subchapter or subchapter II of this chapter for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) ORDER TO REPATRIATE AND DEPOSIT

(A) IN GENERAL—Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) FAILURE TO COMPLY—Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p) of this section, shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) **Warrant of seizure**

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture, the court

shall issue a warrant authorizing the seizure of such property.

(g) Execution

Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property

Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any

person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) **Authority of the Attorney General**

With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this subchapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under

this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions

Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 881(d) of this title shall apply to a criminal forfeiture under this section.

(k) Bar on intervention

Except as provided in subsection (n) of this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

***(l)* Jurisdiction to enter orders**

The district courts of the United States shall have jurisdiction to enter orders as provided in this section

without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions

In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered

forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(*o*) Construction

The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property

(1) In general

Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property

In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction

In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites

The court, when sentencing a defendant convicted of an offense under this subchapter or subchapter II of this chapter involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of Title 18;

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of Title 18.

6. 18 U.S.C. 3663A provides:

Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant—

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—

(i) the greater of—

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim—

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and

treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is—

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit;

(iii) an offense described in section 1365 (relating to tampering with consumer products); or

(iv) an offense under section 670 (relating to theft of medical products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

7. 42 U.S.C. 1320a-7b provides in pertinent part:

Criminal penalties for acts involving Federal health care programs

* * * * *

(b) Illegal remunerations

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind—

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person—

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(3) Paragraphs (1) and (2) shall not apply to—

(A) a discount or other reduction in price obtained by a provider of services or other entity under a Federal health care program if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under a Federal health care program;

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;

(C) any amount paid by a vendor of goods or services to a person authorized to act as a purchasing agent for a group of individuals or entities who are furnishing services reimbursed under a Federal health care program if—

(i) the person has a written contract, with each such individual or entity, which specifies the amount to be paid the person, which amount may be a fixed amount or a fixed percentage of the value of the purchases made by each such individual or entity under the contract, and

(ii) in the case of an entity that is a provider of services (as defined in section 1395x(u) of this title), the person discloses (in such form and manner as the Secretary requires) to the entity and, upon request, to the Secretary the amount received from each such vendor with respect to purchases made by or on behalf of the entity;

(D) a waiver of any coinsurance under part B of subchapter XVIII of this chapter by a Federally qualified health care center with respect to an individual who qualifies for subsidized services under a provision of the Public Health Service Act [42 U.S.C. 201 et seq.];

(E) any payment practice specified by the Secretary in regulations promulgated pursuant to section 14(a) of the Medicare and Medicaid Patient and Program Protection Act of 1987 or in regulations under section 1395w-104(e)(6)[1] of this title;

(F) any remuneration between an organization and an individual or entity providing items or services, or a combination thereof, pursuant to a written agree-

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[1] See References in Text note below.

ment between the organization and the individual or entity if the organization is an eligible organization under section 1395mm of this title or if the written agreement, through a risk-sharing arrangement, places the individual or entity at substantial financial risk for the cost or utilization of the items or services, or a combination thereof, which the individual or entity is obligated to provide;

(G) the waiver or reduction by pharmacies (including pharmacies of the Indian Health Service, Indian tribes, tribal organizations, and urban Indian organizations) of any costsharing imposed under part D of subchapter XVIII of this chapter, if the conditions described in clauses (i) through (iii) of section 1320a-7a(i)(6)(A) of this title are met with respect to the waiver or reduction (except that, in the case of such a waiver or reduction on behalf of a subsidy eligible individual (as defined in section 1395w-114(a)(3) of this title), section 1320a-7a(i)(6)(A) of this title shall be applied without regard to clauses (ii) and (iii) of that section);

(H) any remuneration between a federally qualified health center (or an entity controlled by such a health center) and an MA organization pursuant to a written agreement described in section 1395w-23(a)(4) of this title;

(I) any remuneration between a health center entity described under clause (i) or (ii) of section 1396d(*l*)(2)(B) of this title and any individual or entity providing goods, items, services, donations, loans, or a

combination thereof, to such health center entity pursuant to a contract, lease, grant, loan, or other agreement, if such agreement contributes to the ability of the health center entity to maintain or increase the availability, or enhance the quality, of services provided to a medically underserved population served by the health center entity; and

(J) a discount in the price of an applicable drug (as defined in paragraph (2) of section 1395w-114a(g) of this title) of a manufacturer that is furnished to an applicable beneficiary (as defined in paragraph (1) of such section) under the Medicare coverage gap discount program under section 1395w-114a of this title.

* * * * *

(f) "Federal health care program" defined

For purposes of this section, the term "Federal health care program" means—

(1) any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government (other than the health insurance program under chapter 89 of title 5); or

(2) any State health care program, as defined in section 1320a-7(h) of this title.

(g) Liability under subchapter III of chapter 37 of title 31

In addition to the penalties provided for in this section or section 1320a-7a of this title, a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of subchapter III of chapter 37 of title 31.

(h) Actual knowledge or specific intent not required

With respect to violations of this section, a person need not have actual knowledge of this section or specific intent to commit a violation of this section.

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In The
Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

This is the first time that the Government has asked the Court to uphold a pretrial restraining order that prevents a criminal defendant from using her indisputably untainted assets to exercise her Sixth Amendment right to retain counsel of choice. To the extent that the Government insists that the Court already decided this issue, it was resolved in Petitioner's favor.

> Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond "the individual's right to spend his *own money* to obtain the advice and assistance of . counsel."

Caplin & Drysdale, Chtd. v. United States, 491 U.S. 617, 626 (1989) (emphasis added) (ellipses in original).

In the face of that declaration, the Government nonetheless argues that the Court in *Caplin & Drysdale*, and its companion case, *United States v. Monsanto*, 491 U.S. 600 (1989), rejected Petitioner's Sixth Amendment right to use her untainted assets to retain counsel of choice First, the Government argues that the Court *actually decided* the issue because its general use of the term "forfeitable" in those cases was meant to include both "directly forfeitable" (i.e., tainted) and "substitute" (i.e., untainted) assets. GB:30. Second, the Government argues that the Court *necessarily decided* the issue because the

Government's pre-judgment property interest in both tainted assets and untainted assets is exactly the same. GB:32-35.

The Government misreads the holdings of *Monsanto* and *Caplin & Drysdale*, blurs the significant distinction between tainted and untainted assets, and diminishes the historical importance of the Sixth Amendment right to counsel of choice. In so doing, the Government has advocated a position with dangerous implications to the Sixth Amendment, the adversarial system of justice, and the perception of fairness. Acceptance of the Government's position would mean that, in every indicted case alleging a crime for which the court may impose a monetary judgment upon conviction – whether for forfeiture, restitution, a criminal fine, or even the costs of prosecution – there is no constitutional impediment to the pretrial restraint of a defendant's untainted assets. Few citizens accused of a crime would have sufficient resources to withstand the restraint and still have funds left with which to retain private counsel.

I. The Court Has Never Condoned The Restraint Of Untainted Assets Needed For Counsel Of Choice

When the Court decided *Monsanto* and *Caplin & Drysdale*, at issue was the pretrial restraint and forfeiture of drug money. In neither case did the Government seek to restrain or forfeit assets that were not traceable to a criminal offense. *See* Transcript

of Oral Argument in *Monsanto* (available at https://www.oyez.org/cases/1988/88-454) (Solicitor General: "But assuming that he has other assets, and assuming that those assets are untainted, it's our position that it will very often be the case that he will be able to hire a lawyer, and he simply won't be able to use the tainted assets."). Thus, the constitutionality of restraining untainted assets necessary to retain counsel was neither raised nor argued by the litigants, much less decided by the Court in the Government's favor. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 557 (2001) ("Judicial decisions do not stand as binding 'precedent' for points that were not raised, not argued, and hence not analyzed.") (Scalia, J., dissenting).

The Court's statement in *Caplin & Drysdale* that an individual has the "right to spend his own money to obtain the advice and assistance of counsel," 491 U.S. at 626 (ellipses in original), was hardly controversial, for the Government acknowledged at the time that "[t]he Constitution requires [] that a court afford a defendant a 'fair opportunity to secure counsel of [his] choice' using whatever *assets he has at his lawful disposal*." Brief for the United States in *Caplin & Drysdale, Chtd. v. United States*, No. 87-1729, 1988 WL 1026332, at *42 (emphasis added) (brackets in original) (internal citations omitted).

In *Monsanto* and *Caplin & Drysdale*, the Court upheld the restraint of only tainted assets, which it described as "forfeitable." The Court spoke of "forfeitable" assets in the context of property tainted by criminal activity, 21 U.S.C. § 853(a); there is not a single reference to substitute asset forfeiture under 21 U.S.C. § 853(p). Nevertheless, seizing on the word "forfeitable," the Government argues that the Court meant to extend its holdings to reach all assets that might ultimately be subject to forfeiture, including tainted (i.e., "directly forfeitable") and untainted (i.e., "substitute") assets. *See* GB:30.

The Government made this same argument in its Brief in Opposition to the Petition for a Writ of Certiorari in this case, BIO:9, and continues to press this argument without acknowledging that its own Briefs in *Monsanto* and *Caplin & Drysdale* repeatedly used the terms "forfeitable" and "forfeited" to refer exclusively to tainted assets. *See* Brief for the United States in *Caplin & Drysdale* at *13 ("[I]t is only tainted assets that are subject to forfeiture."); *id.* at *29, *33, *35-36, *42; Brief for the United States in *United States v. Monsanto*, No. 88-454, 1989 WL 1115135, at *21 ("The property that Section 853 declares forfeited is the defendant's drug-tainted property "); *id.* at *20, *28-31, *37, *41-42. Petitioner catalogued those references twice, first in her Reply Brief in support of the Petition (at 4-7), and again in her Brief on the Merits (at 22 & n.4). The Government offers no retort.

2. Petitioner Has A Sixth Amendment Right To Use Her Own Untainted Assets To Retain Counsel Of Choice

The Government argues that, at this stage of the proceeding, its property interest in Petitioner's untainted assets is no different than the interest it had in the tainted assets in *Monsanto*, where the Court approved the pretrial restraint against a Sixth Amendment challenge. GB:32-33. Relying on the principle that its interest in tainted assets under the relation back doctrine is not *perfected* until judicial condemnation, GB:33 (citing *Caplin & Drysdale*, 491 U.S. at 627, and *United States v. A Parcel of Land (92 Buena Vista Ave.)*, 507 U.S. 111, 125-29 (1993)), the Government claims that it had no "established interest" in the tainted assets in *Monsanto*, just as it has no established interest in Petitioner's untainted assets here. GB:33. In the Government's view, as to both tainted and untainted assets, its rights are merely "potential – rights that might spring into being at some time in the future if a condition is satisfied that does not yet exist." GB:33; *see also* GB:33-34 ("[T]he demonstrated potential for the government to prevail and take ownership – not a present property interest – justifies the pretrial restraint."). The Government reasons that, by approving the restraint of tainted assets in *Monsanto*, the Court necessarily approved the restraint of untainted assets as well. GB:32-34.

The Government's argument gets it wrong, both by understating the property interest it has in tainted

assets, like those at issue in *Monsanto*, and by ignoring the significance of Petitioner's own "good title" in her untainted assets, which defendant in *Monsanto* did not have. *Buena Vista* addressed the question of when the Government's title in tainted property is *perfected* under the relation back doctrine.[1] 507 U.S. at 124-26. Prior to *Buena Vista*, the Government mistakenly believed that, under the relation back doctrine, it was automatically the *owner* of tainted property upon the commission of the criminal act. *See Buena Vista*, 507 U.S. at 131 ("[T]he name of the doctrine is not wrong; the Government's understanding of it is.") (Scalia, J., concurring). The Court rejected that view, reasoning that "under the common-law rule the fictional and retroactive vesting was not self-executing," and the Government's title was not "perfected until judicial condemnation." *Id.* at 126 (plurality opinion of Stevens, J.); *see also id.* at 134 (Scalia, J., concurring).

But it is one thing to say, as *Buena Vista* did, that the Government's title to the tainted res is not *perfected* until judgment; it is another thing entirely to say, as the Government does now, that it has no "established interest" at all in the tainted res at the moment of the illegal act or that its rights have yet to "spring into being." GB:33. As the Court recognized in

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[1] In *Buena Vista*, the issue was whether an innocent donee of tainted property could, under the statutory "innocent owner" exception, defeat the Government's forfeiture claim to the property.

Caplin & Drysdale, the relation back doctrine, or "taint theory," does give the Government "property rights" in the tainted res even prior to judicial condemnation. 491 U.S. at 627 ("[T]he property rights given the Government by virtue of the forfeiture statute are more substantial than petitioner acknowledges") (citing 21 U.S.C. § 853(c)); *see also Buena Vista*, 507 U.S. at 126 ("[T]he forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, *although their title is not perfected until judicial condemnation* ") (quoting *United States v. Stowell*, 133 U.S. 1, 16-17 (1890)).

With respect to tainted property, the relation back doctrine gives the Government, at the time of the illegal act, a superior claim to the tainted property vis-a-vis a third party who thereafter acquires the property unless the third party satisfies a statutory exception (e.g., bona fide purchaser for value).[2] So, contrary to the Government's current understanding, GB:33, the Government's property rights do "spring into being" upon the commission of the offense, even if its title is not perfected until judgment.

The Government's pre-judgment property interest in the defendant's drug proceeds animated the

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[2] For example, the statutory exception for an "innocent donee," at issue in *Buena Vista*, was eliminated as part of the Civil Asset Forfeiture Reform Act of 2000, Pub. L. No. 106-185, 144 Stat. 202. *See United States v. Hooper*, 229 F.3d 818, 823 (CA9 2000).

Court's decision in *Monsanto*. The Government disputes this, claiming that "the relation back principle was not mentioned in *Monsanto*'s constitutional analysis of the asset freeze," GB:32 (citing *Monsanto*, 491 U.S. at 615-16), but the Government's view is myopic. In addressing the defendant's Sixth Amendment challenge earlier in the opinion, the *Monsanto* Court expressly relied on the conclusion reached that same day in *Caplin & Drysdale*, 491 U.S. at 614, which, the Government acknowledges, considered the relation back doctrine as a factor in its analysis. GB:32 n.10.[3] Later in the opinion, the Court implicitly invoked the relation back doctrine in "weighing" the Government's pre-judgment "property right in forfeitable assets" against the defendant's proposed use of the tainted assets, and finding that the "pretrial restraining order does not 'arbitrarily' interfere with a defendant's 'fair opportunity' to retain counsel." *Monsanto*, 491 U.S. at 616.

The Court has never indicated that the Government has such a property right in a defendant's untainted assets, and for good reason. The relation back principle gives the Government no property right in Petitioner's untainted assets at this stage; its

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[3] Even earlier in the opinion, the *Monsanto* Court noted the application of the "powerful 'relation-back' provision of §853(c)," refusing to sanction the defendant's use of assets which "under this provision, will become the property of the United States if a conviction occurs . . . ." *Monsanto*, 491 U.S. at 613 (emphasis added).

claim is superior to no one's and will never relate back to any date. For her part, Petitioner's current right, title, and interest in her untainted property is superior to everyone's. She holds "good title," *Caplin & Drysdale*, 491 U.S. at 627, which is neither voidable nor defective. *Compare Buena Vista*, 507 U.S. at 140-42 (Kennedy, J., dissenting) (describing the drug dealer as holding "voidable" and "defective" title in the drug proceeds). Accordingly, Petitioner does not seek the judicial creation of a Sixth Amendment exception to the relation back doctrine, for the Sixth Amendment has always recognized "the individual's right to spend his own money to obtain the advice and assistance of counsel." *Caplin & Drysdale*, 491 U.S. at 626 (ellipses in original).

The Government barely acknowledges the Sixth Amendment right at stake. The right to retain private counsel was "the root meaning of the constitutional guarantee." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006).

> At the time of the adoption of the Bill of Rights, when the availability of appointed counsel was generally limited, that is how the right inevitably played out: A defendant's right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure.

Id. at 154 (Alito, J., dissenting); *accord Bute v. Illinois*, 333 U.S. 640, 660-61 (1948). As it was originally envisioned, "[t]he Sixth Amendment

encompasse[d] a non-indigent defendant's right to select counsel who [would] represent him in a criminal prosecution . " *Gonzalez-Lopez*, 548 U.S. at 153 n.1 (Alito, J., dissenting) (quoting Brief for United States in *Gonzalez-Lopez*, at *11). It was understood that, in the main, the exercise of this constitutional right depended largely on a defendant's access to legitimate funds with which to retain private counsel. Prohibiting a "non-indigent" defendant from using her rightfully owned funds to employ counsel would have been tantamount to denying counsel altogether. *See generally* Amicus Brief of Rutherford Institute.

Because Petitioner has a Sixth Amendment right to spend her rightful assets free from governmental interference, the law enforcement interests and policy considerations cited by the Government, GB:35-37, are beside the point. The Government surely has an interest in convicting a guilty defendant, but that would not, for example, justify forcing her to incriminate herself, twice putting her in jeopardy for the same offense, or denying her a jury trial. The policy arguments advanced by the Government were considered by the Court in *Caplin & Drysdale*, but there was no Sixth Amendment right at stake in that case. *Caplin & Drysdale*, 491 U.S. at 626 ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney"); *id.* at 628 ("There is no constitutional principle that gives one person the right to give another's property to a third party, even where the person seeking to

complete the exchange wishes to do so in order to exercise a constitutionally protected right.").

Regardless, none of the policy considerations advanced by the Government trumps Petitioner's constitutional right. *See generally* Amicus Brief of National Association of Criminal Defense Lawyers, et al. at 24-33. The Government argues that permitting Petitioner to pay her counsel with untainted assets would reward the "sophisticated criminal," ignore "the purpose of criminal forfeiture and the rights of victims," and lead to "absurd and unfair results." GB:35-37.

The Government envisions the "sophisticated criminal" studying and exploiting the nuances of Supreme Court forfeiture jurisprudence in structuring her finances, suggesting that the more wily criminal will dissipate tainted assets first and save untainted assets for the retention of counsel. GB:36-38. Aside from the improbability of that scenario, the "sophisticated criminal" would not have been so wily after all because, on that rainy day of her arrest, she will be facing more time in prison for having laundered the tainted assets. *See* 18 U.S.C. §§ 1956 and 1957; U.S.S.G. § 2S1.1.

The Government also exaggerates the impact on criminal forfeiture. There is no doubt that criminal forfeiture is big business, having generated more than $3.77 billion last year for the Department of

Justice Asset Forfeiture Fund.[4] The relative effect on the public fisc of permitting an accused to pay her attorney of choice with untainted assets is de minimis; and the net effect is even less, considering that the government would have to foot the bill for appointed counsel in any event.[5]

Likewise, the Government's professed concern for crime victims is overstated. A convicted defendant may be ordered to pay both forfeiture and restitution. *See, e.g.*, *United States v. McGinty*, 610 F.3d 1242 (CA10 2010). But when there is not enough money available to go around, "[f]orfeiture and restitution, as a matter of fact, frequently compete for the same assets of a convicted defendant." *United States v. Rubin*, 558 F. Supp. 2d 411, 420-21 (E.D.N.Y. 2008). The Government, which is responsible for collecting the criminal judgment, disclaims any legal obligation to apply forfeited funds to restitution. *See* GB:31; *United States v. Pescatore*, 637 F.3d 128, 138 (CA2 2011); Department of Justice Asset Forfeiture Policy

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[4] *See* Report No. 15-08, Audit of the Assets Forfeiture Fund and Seized Asset Deposit Fund Annual Financial Statements, Fiscal Year 2014, Office of the Inspector General (January 2015), available at http://www.justice.gov/afp/annual-financial-statements.

[5] Amici National Association of State Legislatures, et al. claim to fear "a massive unwarranted preemption of validly-enacted state laws," Amicus Brief at 4, if the Court rules in favor of Petitioner. While Amici (Amicus Brief at 8-9) cite state laws that authorize the *forfeiture* of substitute assets (which would not be affected by the outcome of this case), they do not cite a single state statute, similar to Section 1345, that even authorizes the *pretrial restraint* of substitute assets.

Manual (2013) at 167-68; *see also* 28 C.F.R. § 9.8(b)(5) (requiring that the victim demonstrate no "recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.").

The Government fails to consider the "absurd and unfair" results that would arise if the Court accepted its invitation to treat an accused's untainted assets as if they are already tainted for Sixth Amendment purposes. Upon indictment, a court could constitutionally restrain as much of a defendant's legitimate wealth as may be needed to satisfy the potential criminal judgment which, in addition to forfeiture and restitution, might also include costs of prosecution, *see* 28 U.S.C. § 1918, and a fine, which may be "the greater of twice the gross gain or twice the gross loss" from an offense. 18 U.S.C. § 3571(d). Nearly every imaginable wrongful act from A to Z – covering everything from Arson (18 U.S.C. § 81) and Aviation crimes (49 U.S.C. § 46504), to importation of Zebra mussels (18 U.S.C. § 42) and causing property damage at a Zoo (18 U.S.C. § 43) – may be punished by financial penalties. The amount of such penalties can multiply quickly. *See generally, e.g.*, 33 U.S.C. § 1319 (per day); 42 U.S.C. § 6928 (per day); 22 U.S.C. § 2778(c) (per violation).

In the context of 18 U.S.C. § 1345, the Government has tested the limits of its power, in one case obtaining a restraining order (which was eventually vacated) in an amount sufficient to cover treble damages. *See United States v. Sriram*, 147 F. Supp. 2d

914, 947 (N.D. Ill. 2001). Presumably, in the Government's view, so long as there is probable cause, there is no constitutional impediment to a pretrial restraint that covers as much of a defendant's untainted assets as might be needed to satisfy any financial penalty, even when the amount of the penalty may be grossly disproportionate to the actual amount of loss to the victim or gain to the defendant. *See, e.g., United States v. Cano-Flores*, 796 F.3d 83, 91, 95-96 (CADC 2015) (vacating $15 billion forfeiture that was based upon a theory of joint and several liability). And, presumably, in the Government's view, a grand jury indictment would be sufficient to establish probable cause such that a Section 1345 hearing is not even constitutionally required. *See Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014).

Meanwhile, the Government has persuaded grand juries to indict and petit juries to convict on legal theories later determined by the Court to be misguided. *E.g., Yates v. United States*, 135 S. Ct. 1074 (2015); *Bond v. United States*, 134 S. Ct. 2077 (2014); *Skilling v. United States*, 561 U.S. 358 (2010); *Cuellar v. United States*, 553 U.S. 550 (2008); *United States v. Santos*, 553 U.S. 507 (2008); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *Cleveland v. United States*, 531 U.S. 12 (2000); *Neder v. United States*, 527 U.S. 1 (1999); *United States v. Aguilar*, 515 U.S. 593 (1995); *McNally v. United States*, 483 U.S. 350 (1987); *see also United States v. Newman*, 773 F.3d 438, 444-45 (CA2 2014), *cert. denied*, (U.S. Oct. 5, 2015). Based on flawed theories

of prosecution, the Government can obtain staggering forfeitures, fines, restitution awards, and other financial penalties. *E.g.*, *Skilling*, 561 U.S. at 375 ($45 million in financial penalties); *Newman*, 773 F.3d at 444-45 ($8 million in total financial penalties for two defendants). Pretrial restraints of untainted assets in most such cases would financially cripple the average citizen, making it impossible for her to retain private counsel of choice that she could otherwise afford.

It is no answer that the newly-beggared defendant is entitled to appointed counsel. Nor is it sufficient that the appointed attorney will provide equally as, or even more, effective representation than many private attorneys would. *See* GB:40-41. While a lawyer may not be deficient for failing to "go looking for a needle in a haystack." *Maryland v. Kulbicki*, No. 14-848, ___ S. Ct. ___, 2015 WL 5774453, at *2 (Oct. 5, 2015), a non-indigent defendant is entitled to hire a lawyer who will. That was the "root" guarantee of the Sixth Amendment, *Gonzalez-Lopez*, 548 U.S. at 147-48, which is in danger of being eviscerated by the pretrial restraint of legitimate assets needed for counsel of choice.

3. The Avoidance Canon Compels A Construction Of 18 U.S.C. § 1345 That Avoids The Constitutional Question

The Government contends that the constitutional avoidance doctrine is inapplicable because Section

1345 is susceptible to a single, unambiguous interpretation that authorizes the pretrial restraint of substitute assets needed to retain counsel. The Government advances the same interpretation here that it advanced in *United States v. DBB, Inc.*, 180 F.3d 1277, 1281-82 & n.7 (CA11 1999). Although the Government's interpretation prevailed as a matter of pure statutory construction, that case did not involve a constitutional question and the Eleventh Circuit expressly found the statute to be ambiguous. *Id.* at 1281-82 & n.7. And what the Government dismisses as Petitioner's "strained reading" of the statute, GB:18, was deemed by the Eleventh Circuit to be "consistent with common usage and dictionary definitions." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 n.4 (CA11 2001).

Where a statute, like this one, is deemed ambiguous, the "canon of constitutional avoidance comes into play" precisely because "the statute is found to be susceptible of more than one construction . " *Clark v. Martinez*, 543 U.S. 371, 385 (2005). The Government cannot sidestep this principle merely by critiquing Petitioner's construction, particularly when its own reading is so far from perfect. *See* Amicus Brief of Cato Institute, et al. at 19 ("[Section] 1345 does not support the construction urged by the government."); Amicus Brief of Americans for Forfeiture Reform at 4 ("[T]he Act does not authorize the freezing of a person's untainted property based on the sum value of property that a person may have improperly obtained or used in the past."); Amicus Brief of United States

Justice Foundation, et al. at 6-12 ("The Government's interpretation of [Section] 1345 is extreme and unsupportable.") (capitalization modified).

Petitioner has offered a construction of the statute that averts the constitutional questions. So too have amici. *See* Amicus Brief of Americans for Forfeiture Reform at 4 ("The Act instead requires the government to show the total amount of money in Doe's accounts that is traceable to the alleged fraud today (whether $1 or $100,000) and further show that Doe intends to spend this tainted cash. The Act then enables the court to freeze either the tainted cash or untainted property belonging to Doe of equivalent value – but not both."); Amicus Brief of United States Justice Foundation, et al. at 11 ("The statute, then, is designed to keep the status quo by the issuance of an injunction to stop a suspect from further alienating or disposing of traceable property that he currently has in his possession."); Amicus Brief of American Bar Association at 22-23 ("This plain-language, commonsense reading of [Section] 1345" authorizes "[t]emporary restraints only with respect to imminent transfers of tainted assets.").

The Government's reading of Section 1345 gives rise to a nesting-doll statute, in which one provision is completely swallowed by a subsequent provision, which is completely swallowed by a third provision, all within the same statute. *See Yates v. United States*, 135 S. Ct. at 1085 ("We resist a reading that would render superfluous an entire provision passed in proximity as part of the same Act."). Yet the

Government refuses to cede that its reading is in any way problematic or to acknowledge that any other competing construction is even plausible.

Start with Section 1345(a)(2)(A): This provision allows the Government to commence a civil action "to enjoin such alienation or disposition of property" which is "obtained as a result of" or is "traceable to" a specified criminal offense. It authorizes the Government to seek an injunction for an undefined duration, but only against the named defendant, GB:23, for a narrow class of crimes (banking and health care offenses), and for a narrow class of assets (tainted).

Section 1345(a)(2)(B) comes next: This provision allows the Government to commence a civil action "for a restraining order" to "prohibit any person" from dissipating any tainted assets or any "property of equivalent value." If, as the Government reads it, "restraining order" means more than just a "*temporary* restraining order," then this provision swallows the provision that came before it. The Government does not claim otherwise. *See* GB:22. The Government offers no explanation for the obvious superfluity, which it prefers to characterize as an "overlap." GB:22-23.[6]

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[6] The Government has previously conflated the definitions of overlap and superfluity, although they mean two different things. *Yates*, 135 S. Ct. at 1085. Overlap occurs when two provisions share a common ground in particular "applications," or do the same work in a particular case. *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 n.11

(Continued on following page)

Petitioner's alternative interpretation gives meaning to both provisions. In contrast to the previous provision, Section 1345(a)(2)(B) reaches more people ("any person") and more assets (tainted and untainted), but for a shorter duration (temporary instead of indefinite).

Section 1345(b) is last: This section provides procedures to resolve the "civil action" commenced by the Attorney General under Section 1345(a). Perhaps recognizing that its own construction of the statute renders Section 1345(a)(2)(A) superfluous, the Government claims that under Petitioner's reading of the statute, Section 1345(a)(2)(B) is "entirely swallowed by Section 1345(b)." GB:22. Not so. It is the Government's position in this case, and in others like it, that gives rise to the additional layer of superfluity. *See* GB:20 n.5 ("Section 1345(b) independently supports the restraining order in this case"); *United States v. Brown*, 988 F.2d 658, 661 (CA6 1993) (The United States maintains that the court is empowered

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(1995). Superfluity, on the other hand, occurs where one word or one provision of a statute is completely covered and rendered completely redundant by the application of another in every application and in every case.

Under the Government's reading, nothing would change if Section 1345(a)(2)(A) were stricken because Section 1345(a)(2)(B) provides the same relief and more. *Compare Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (overlap exists where each section has applications that "the other section does not reach") *with Yates*, 135 S. Ct. at 1085 (superfluity exists where the Government fails to "explain what independent function" each provision could serve).

to attach funds through [Section] 1345(b)" even for offenses beyond those enumerated in Section 1345(a)). Under Petitioner's reading, by contrast, Section 1345(a) defines the relief that the Government may seek, whereas Section 1345(b) establishes procedures for the court to grant such relief.

Petitioner's interpretation of Section 1345 is plausible because it gives meaning to all of the provisions of the statute and leads to sensible results (albeit not quite as draconian as the Government would like). Regardless of whether the Government's alternative interpretation is more plausible, less plausible, or equally plausible, an ambiguity exists. And where there is an ambiguity, the Court must enforce the interpretation that avoids constitutional doubts.

4. The Section 1345 Hearing Failed To Comport With Due Process

Petitioner maintains that no amount of procedural due process can justify the denial of the right to use one's own money to retain counsel of choice in a criminal case. But Petitioner nonetheless challenged the constitutional adequacy of the Section 1345 hearing in the lower courts. In the Petition, she framed the "Question Presented" as a challenge to the pretrial restraint under both the Fifth and Sixth Amendments, noting that she had objected to the procedures used to deny her counsel of choice. Petition at 13 n.4; *see also* Reply Brief in Support of

Petition, at 13 n.4. While Petitioner did not articulate a stand-alone due process argument in the Petition, the level of process necessary before counsel of choice is denied (assuming no categorical bar) is necessarily intertwined with Petitioner's Sixth Amendment challenge. The issue is "fairly included" in the Question Presented, fully-briefed, and the Court should exercise its discretion to consider it.

The Government insists that *Monsanto* and *Kaley* foreclose Petitioner's challenge to the standard of proof. The Government characterizes the application of the probable cause standard as essential holdings of both cases. GB:45. It is true that in both cases the Court applied the probable cause standard. But the propriety of a probable cause standard was not at issue in *Monsanto* nor squarely disputed in *Kaley*, so the question remains open.

While it may appear "odd" to the Government that a different standard might apply, GB:46, it is only because the Government insists on treating a defendant's lawfully earned assets as if they are tainted. But they are different. A defendant surely has a greater interest in the fruits of her life's *lawful* labor than she does in the proceeds of an alleged crime. So it creates no legal dissonance to require more proof where the seizure of those lawfully earned funds are needed to exercise her constitutional right to counsel. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63 (1989) (requiring more than "probable cause" to justify seizure of allegedly pornographic books because the books were "presumptively

protected by the First Amendment"); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993) (a seizure can implicate more than just one constitutional right) (citing *Soldal v. Cook County*, 506 U.S. 56, 70 (1992)).

Given that the Government must prove Petitioner guilty beyond a reasonable doubt in order to forfeit her untainted assets, and given that enjoining her from using those assets pretrial will permanently deprive her of her constitutional right to private counsel of choice, a standard of proof more demanding than preponderance of evidence should be required.

Whatever the standard, it is not enough that the hearing consist of little more than the sworn proffer of a government agent parroting the unsworn interviews of confidential informants and summarizing bank records. The district court categorically prohibited Petitioner from examining any of the informants, P.App. 16,[7] and prohibited Petitioner from presenting evidence that the home health companies in fact provided medically necessary services to its Medicare patients. DE87:16; J.App. 115. Yet the district court concluded that all of the $45 million in revenues received from Medicare were unlawfully obtained and dissipated. P.App. 12-15. It enjoined Petitioner from spending any (all) of her assets up to $45 million, even though the loss for purposes of restitution is the

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[7] The Government mistakenly states that Petitioner made a "strategic judgment" not to call them to the stand. GB:54-55.

amount of the kickbacks, not the total revenue received from Medicare. *United States v. Bane*, 720 F.3d 818, 827-28 (CA11 2013).

Even if the Confrontation Clause has no direct application in the Section 1345(b) hearing, GB:53, due process and the Federal Rules of Civil Procedure do apply and require "an effective opportunity to defend by *confronting* any adverse witnesses and by *presenting* his own evidence." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) (emphasis added).

5. The Pretrial Restraint Of Untainted Assets Threatens The Adversarial System Of Justice

A statute that gives a litigant the power to control the purse strings of its adversary upsets the "balance of forces" in the courtroom. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). The Government construes Section 1345 to do just that. At any point in its contest with the accused, the Government can invoke the statute to freeze her untainted assets needed for a defense.

Because the restraint reaches "any person," it would restrain the attorney who is holding funds in trust for the fees and costs of the criminal litigation. 18 U.S.C. §1345(a)(2)(B). It makes no difference that, before accepting the client's funds, the attorney vetted the sources to assure himself (correctly) that the funds were derived exclusively from lawful sources; the funds would be locked down just the same.

The power to freeze untainted assets thus allows the Government to exert unprecedented "leverage" over the client *and the attorney*. Amicus Brief of New York Council of Defense Lawyers at 7. The restraint would prohibit the attorney from paying associates, paralegals, investigators, experts and other litigation expenses. In complex, document-intensive cases of longer duration – where discovery is measured in terabytes rather than bankers boxes – few attorneys could withstand the cash-crunch that the restraint would impose.

Some attorneys would withdraw from the representation. Others would be prohibited from doing so by court rule. *See, e.g.*, Rule 88.7, Local Rules of the Southern District of Florida.[8] Either way, the Government would then have the defense bar under its thumb. Working without pay, no attorney could be expected to ignore the powerful financial incentive to avoid a long, drawn-out trial by accepting any settlement at all (i.e., a plea). One that exempts from forfeiture the untainted funds earmarked for fees and

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[8] Rule 88.7(a) provides:

> Retained criminal defense attorneys are expected to make financial arrangements satisfactory to themselves and sufficient to provide for representation of each defendant until the conclusion of the defendant's case at the trial level. Failure of a defendant to pay sums owed for attorney's fees, or failure of counsel to collect a sum sufficient to compensate him for all the services usually required of defense counsel, will not constitute good cause for withdrawal after arraignment.

expenses would appear especially attractive to the attorney, if not to his client. Feeling the pinch of the restraint, how could an attorney discharge his duty to provide conflict-free advice about whether the client should proceed to trial or waive her rights and cop a plea, when his own financial interests are at stake? *See generally Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1384 (2012). In a country that lauds the virtues of an *adversarial* system of justice, the image of once-fearless defense attorneys "negotiat[ing] [plea deals] with the government in order to receive payment for their services," Amicus Brief of New York Council of Defense Lawyers at 8, is, to say the least, unsettling.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

SILA LUIS, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Brief *Amicus Curiae* of United States Justice Foundation, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, Inc., Lincoln Institute, Abraham Lincoln Foundation, Institute on the Constitution, and Conservative Legal Defense and Education Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

United States Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, The Lincoln Institute for Research and Education, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org, Gun Owners of America, Inc., and The Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, and related issues.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Many of these organizations filed an *amicus curiae* brief in Kaley v. United States, 571 U.S. ___ (2014),[2] and at the petition stage in the present case.[3]

SUMMARY OF ARGUMENT

A myriad of federal laws authorize the forfeiture of assets, and the district court was careless in concluding that 18 U.S.C. § 1345 authorized the seizure of Petitioner's untainted assets pending resolution of the case. Such a reading of the statute was not compelled, but rather should have been rejected to avoid jeopardizing an important constitutional right.

The court of appeals failed to do its duty to review Petitioner's constitutional claims *de novo*, claiming without analysis that four prior decisions, including three decisions of this Court, "foreclosed" Petitioner's appeal, when this Court's decisions could never fairly be read to have resolved the issue presented in this appeal.

Asset forfeiture law was designed to permit Government seizure only of property over which the Government has a superior property interest. In disregarding this principle, the courts below abrogated Petitioner's protected common law property rights,

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[2] http://www.lawandfreedom.com/site/constitutional/KaleyvUS_amicus.pdf.

[3] http://www.lawandfreedom.com/site/constitutional/Luis%20USJF%20Amicus%20Brief.pdf.

including the right to expend her property to retain counsel of her choice.

In violation of the Fifth Amendment, the district court improperly seized assets of the Petitioner over which the Government has no valid, current property interest, denying her the right to retain counsel of choice to fight for her rights in violation of the Sixth Amendment.

As Congress and the courts have cooperated in the vast expansion of federal asset forfeiture powers, federal prosecutors have been given tools that no one in Government should have — powers which put the American people in fear not of punishment for crime, but in fear of the exercise of arbitrary power by their own Government.

ARGUMENT

In an apparent effort to employ 18 U.S.C. § 1345 to maximal advantage against the Petitioner below, the Government has adopted a series of extreme legal positions, oblivious to rules of statutory construction, and even to the duty to be candid with the tribunal as to the substance of prior holdings. The Government's positions also would compromise the right to property and right to counsel, as protected by the Fifth and Sixth Amendments.

Audaciously, the Government adopts the following hard-line positions herein:

(i) the statutory language authorizing use of temporary restraining orders of limited duration to seize, in some cases, untainted "property of equivalent value" in 18 U.S.C. § 1345(B)(1) should be judicially imported into a different section of the statute where it does not appear, to authorize injunctions seizing untainted assets that continue until verdict (*see* section I, *infra*);

(ii) the Eleventh Circuit properly found Petitioner's effort to use untainted assets to retain counsel was barred by three decisions of this Court, none of which involved either the statute relied on in this case, or the issue of untainted assets (*see* section II, *infra*);

(iii) the power of asset forfeiture in criminal cases is a well-established power that should be utilized without the need to understand its limits, as revealed by examination of its history (*see* section III, *infra*); and

(iv) the Sixth Amendment does not limit the Government's ability to prevent a criminal defendant from using her own resources to engage counsel of her choice, even though the Government is seeking only to protect a speculative future claim to her property (*see* section IV, *infra*).

Additionally, in matters not addressed herein, the Government asserts that the hearing provided for in section 1345(b) need not protect the defendant's right to cross-examine adverse witnesses, and the court may seize assets over which the Government has no superior property interest based exclusively on hearsay and a finding of mere "probable cause." *See* Brief for the Petitioner ("Pet. Br.") at 43-45.

Demonstrating no reluctance to assert highly aggressive statutory interpretations, as well as positions that impair Petitioner's rights protected by the U.S. Constitution at each turn, the Government seeks every possible advantage over Petitioner. The Government claims that its only objective is to protect the Government's financial interests, but those interests are at best speculative future interests. The only certain effect of the Government's strategy is to facilitate the prosecutor's quest for conviction through the crippling of Petitioner in her ability to defend herself from federal criminal charges.[4]

The implications of these positions in the brave new world of asset seizure and forfeiture, urged by the Government, should send shivers down the backs of the Justices on this Court, who are tasked with guarding the rights of the people against this Government's headlong pursuit of powers typifying those of a totalitarian police state.

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[4] There once was a day when federal prosecutors were charged to elevate justice over winning. "Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done." Justice Robert Jackson, 24 J. AM. JUD. SOC'Y 18 (1940), 31 J. CRIM. L. 3 (1940) (address at Conference of United States Attorneys, Washington, D.C., April 1, 1940).

I. THE GOVERNMENT'S INTERPRETATION OF 18 U.S.C. § 1345 IS EXTREME AND UNSUPPORTABLE.

The Government steadfastly refuses to temper its creative reading of the statute that it employed against Petitioner so as to avoid violation of Petitioner's constitutional rights. The statute in question, 18 U.S.C. § 1345, is commonly referred to as the federal Fraud Injunction Statute. Enacted as part of the Comprehensive Crime Control Act of 1984, 98 Stat. 1837, 2152, this statute was amended in 1988 to apply to fraudulent claims against the United States and conspiracies to defraud the United States. The statute was amended again in 1990, "in the wake of the multi-billion dollar savings and loan debacle" to apply to "banking-law violations,"[5] and was otherwise modified into its present form.[6] Section 1345 is just one of scores of federal statutes which govern civil and criminal asset seizures and forfeitures (hereinafter termed "asset forfeiture statutes").[7]

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[5] *See generally* United States v. Brown, 988 F.2d 658, 660-61 (6th Cir. 1993).

[6] The statute was further amended in 1994 and 1996 in other ways not relevant here (except to add "Federal health care fraud" to the list of offenses).

[7] *See generally* S. Cassella, "Overview of Asset Forfeiture Law in the United States," U.S. Attorneys' Bulletin (Nov. 2007); the U.S. Department of Justice's Asset Forfeiture & Money Laundering Statutes compendium runs 349 pages. http://www.justice.gov/criminal/afmls/pubs/pdf/statutes2013.pdf.

Varying significantly, each asset seizure forfeiture statute provides for the forfeiture of different assets, with different procedural protections, and each such statute must be analyzed carefully and individually. Cases interpreting one asset forfeiture statute cannot be imported wholesale as precedent to interpret and determine the operation of different provisions in a different asset forfeiture statute.

Turning to the statute in question, under section 1345(a)(1), the Attorney General is granted authority to "commence a civil action" seeking to enjoin disposition of property associated with a violation of law by a person who is "committing ... a Federal health care offense." Under section 1345(a)(2), should that person be found to be "alienating or disposing of property, or intend[ing] to alienate or dispose of **property, obtained as a result of** ... a Federal health care **offense**," the Attorney General may:

> "commence a civil action ...
> (A) to **enjoin** such alienation or disposition of property; or
> (B) for a **restraining order** to —
> (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property **or property of equivalent value**.... [Emphasis added.]

Lastly, under section 1345(b):

> The court shall proceed as soon as practicable to the **hearing and determination** of such an action, and may, at any time before final

> determination, [i] enter such a restraining order or prohibition, or [ii] take such other action, as is warranted to prevent a continuing and substantial injury to the United States or to any person or class of persons for whose protection the action is brought. [Emphasis added.]

Unlike other asset forfeiture statutes which authorize the Government to enjoin the dissipation only of so-called "tainted" assets which are related to the allegedly criminal behavior (*e.g.*, the fruits of the crime), section 1345 authorizes a "restraining order" against both tainted property and "property of equivalent value." In the first instance, therefore, this case presents a matter of statutory construction as to the scope of the Government's statutory power to seek a restraining order over "property of equivalent value."

Petitioner takes the eminently reasonable position (Pet. Br. at 33-41) that the statute distinguishes between:

> (i) a narrow class of property "obtained as a result of a ... Federal health care offense or property which is traceable to such violation" which can be the subject of an injunction that would remain in place pending the outcome of the criminal case (section 1345(a)(2)(A)); and
>
> (ii) a broader class of property — including "property of equivalent value" — which can be the subject only of a temporary "restraining order" (section 1345(a)(2)(B)).

This second, broader class of property may only be restrained until the hearing provided for in section 1345(b) is held, "at which time the Government must be prepared to identify, through proof, the tainted assets that will be the subject of the injunction." Pet. Br. at 35.

Petitioner urges this Court to follow "the canon of constitutional avoidance" by "considering the statutory basis for reversal to avoid the serious constitutional questions attendant to the restraint of untainted assets." Pet. Br. at 33-34. Justice Scalia's treatise on interpretation of texts distinguishes between two "rules of constitutional avoidance." The first is a rule of interpretation — that "A statute should be interpreted in a way that avoids placing its constitutionality in doubt." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts (Thomas/West: 2012) at 251. The second is that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction.... the Court will decide only the latter." *Id.* Here, both rules come into play. As Justice Scalia described it: "[i]n the process of considering the statute first, the court may find that one of its interpretations must be rejected as constitutionally doubtful." *Id.*

Moreover, there are additional rules of construction applicable here. In identifying the property that may be seized, 18 U.S.C. § 1345(a)(2)(A) and (B) track F.R.Civ.P. Rule 65 in distinguishing between an injunction and a temporary restraining order:

- Subsection 1345(a)(2)(A) allows for injunction against defendant's transfer of tainted property; and
- Subsection 1345(a)(2)(B) authorizes a temporary restraining order over both tainted and untainted property to prevent a defendant, who is in danger of indictment, from disposing of tainted assets currently in his possession until the court can determine which assets are tainted and which are not.

Subsection (B) cannot be read to supersede section (A), as the Government urges. If subsection (B) is read independently of (A); then a court would be authorized to issue a permanent injunction extending not just to tainted assets, as provided in § 1345, but even to untainted assets, beyond the scope of tainted asset protection provided by § 1345(a)(2)(A). In other words, 18 U.S.C. § 1345(a)(2)(B) cannot be read to provide for a permanent injunction that extends to "property of equivalent value," because to do so would subtract from 18 U.S.C. § 1345(a)(2)(A) the limiting phrase "obtained as a result of a ... Federal health care offense or property which is traceable to such violation." Such a reading of the statute would violate the "surplusage canon" that, "[i]f possible, "every word and every provision is to be given effect." Reading Law at 174. After all, what would be the point of an initial finding that an asset was not traceable and, thus not subject to the court's injunctive power under (A), if the court could turn around and invoke its restraining power under (B) to enjoin the property of equal value?

Moreover, to read the grant of authority to issue a restraining order — other than one that is temporary and limited in purpose, as Petitioner has argued — would not comport with the § 1345 text as a whole, as required by the whole-text canon. Reading Law at 167.

18 U.S.C. § 1345(a)(1)(C) serves as a prophylactic measure to be employed by a Government prosecutor investigating an alleged ongoing conspiracy to defraud the United States. As applied here, the statute authorizes the Government to institute a "civil action" to enjoin a person **if** that person is currently "alienating or disposing of property, or intend[ing] to alienate or dispose of property, **obtained as a result of** ... a federal health care offense which is **traceable** to such violation."

The statute, then, is designed to keep the status quo by the issuance of an injunction to stop a suspect from further alienating or disposing of traceable property that he currently has in his possession. Its purpose is not to sweep up tainted property that the person has previously alienated or disposed of by setting aside "property of equivalent value" as a hedge against a future shortfall should the Government fail to prove a loss exceeding the tainted property protected by a § 1345(a)(2)(A) injunction. In short, § 1345 was not designed, as a whole, by Congress to destroy the distinction between tainted and untainted assets so as to eliminate altogether the risk that a

convicted defendant may have insufficient assets to satisfy a future judgment in favor of the Government.[8]

II. THE COURT OF APPEALS BASED ITS RULING ON THREE DECISIONS OF THIS COURT, NONE OF WHICH ADDRESSED, MUCH LESS DECIDED, THE ISSUE PRESENTED HERE.

The Government appears to contend that there is no need to carefully analyze the statutory text, because the issue in this case has already been decided by this Court in three prior cases, cited and relied on by the Eleventh Circuit. In truth, none of those three cases addressed the issue presented here.

In opposing the petition herein, the Government revealed what it doubtless will be arguing in its merits brief — that the Eleventh Circuit was completely correct in ruling that the issue presented here has already been decided by this Court. Br. in Opposition at 9-10.[9] However, the court below was lax — if not

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[8] The legitimate scope of asset forfeiture can be seen to parallel the historic limitations on Fourth Amendment searches and seizures: "warrants that authorized seizures of items other than fruits of a crime, instrumentalities of a crime, or contraband were invalid." C. Whitebread, Criminal Procedure, § 5.04(a), 119 (Foundation Press: 1980).

[9] The court of appeals represented that it would "review questions of law, such as a statute's constitutionality and whether a preliminary injunction violates an individual's constitutional rights, *de novo*" (United States v. Luis, 564 Fed. Appx. 493, 494 (11th Cir. 2014)), but then did so in only the most superficial

careless — in its analysis, giving only cursory attention to Petitioner's claims, and no thoughtful attention whatsoever to the holdings of the precedents on which it relied, concluding simply that:

> [t]he arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley v. United States*, ___U.S. ___, 134 S.Ct. 1090, 1105, 188 L.Ed.2d 46 (2014); *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617, 631, 109 S. Ct. 2646, 2655, 105 L.Ed.2d 528 (1989); *United States v. Monsanto*, 491 U.S. 600, 616, 109 S.Ct. 2657, 2667, 105 L.Ed.2d 512 (1989); and *United States v. DBB, Inc.*, 180 F.3d 1277, 1283-84 (11th Cir. 1999). Accordingly, we affirm the district court's order granting the government's motion for a preliminary injunction. [Pet. App. at 3.]

The Eleventh Circuit apparently never noticed that none of this Court's three decisions addressed the Government's claimed authority to seize untainted assets under 18 U.S.C. § 1345.

Kaley v. United States involved seizure of an indicted defendant's assets prior to trial under 21 U.S.C. § 853(e), which governs criminal forfeitures. Unlike here, no untainted assets were seized in Kaley. Indeed, writing for the Court, Justice Kagan described the purpose of criminal forfeitures as being "imposed

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manner.

upon conviction to confiscate assets used in or gained from certain serious crimes." Kaley at 1094. "There must be probable cause to think ... that the property at issue has the requisite connection to that crime." *Id.* at 1095. Moreover, the Court noted that, "[a]t oral argument, the Government agreed that a defendant has a constitutional right to a hearing on whether "the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Id.* at 1095 and n.3. The Court was clear that it was focused on tainted assets, stating that "the Government sought a restraining order ... to prevent the Kaleys from transferring any assets traceable to or involved in the alleged offenses ... except as to $63,000 that it found ... was not connected to the alleged offenses." *Id.* at 1095-96.

Caplin & Drysdale v. United States also involved 21 U.S.C. § 853, which "authorizes forfeiture to the Government of 'property constituting, or derived from ... proceeds ... obtained' from drug-law violations...." *Id.* at 619-20. Justice White stated that "[t]he forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing." *Id.* at 625. Nevertheless, "[t]here is no constitutional principle that gives one person the right to give another's property to a third party [attorney]." *Id.* at 628. United States v. Monsanto, decided the same day as Caplin & Drysdale, also involved a pretrial seizure under 21 U.S.C. § 853, as well as a claim that the statute should be interpreted to allow use of seized tainted funds to retain counsel. Justice White described this statute as providing "that a person convicted of the offenses charged ... 'shall

forfeit ... any property' that was derived from the commission of these offenses." *Id.* at 607. The Court found "no exemption" from this provision "for assets which a defendant wishes to use to retain an attorney." *Id.* at 614. Like Kaley, neither case involved untainted assets.[10]

In opposing the petition for certiorari, the Government adopted a new argument to explain why it is irrelevant that all of these three prior Supreme Court decisions involved tainted assets in the context of a different statute, 21 U.S.C. § 853, and that none involved substitute assets. These central legal and factual differences from this case appear to have been deemed irrelevant because the Government now asserts that none of the Justices sitting on those three

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[10] The fourth case cited by the Eleventh Circuit was its own panel's decision, United States v. DBB, Inc., which did involve 18 U.S.C. § 1345, and an injunction which would allow the seizure of "property of equivalent value" as in the instant case. However, the court made clear that "[b]oth parties agree that subsection (a)(2)(A) authorizes injunctions to freeze property obtained through fraud or traceable to fraud and that subsection (a)(2)(B) authorizes TROs that freeze property of equivalent value." The only issue litigated was "whether subsection (a)(2)(B) ... also authorizes the court to grant injunctions" to freeze those categories of property. The defendant challenged only whether a seizure of "property of equivalent value" was permitted in an injunction, rather than a restraining order. The Government's authority to seize "property of equivalent value" in some form was conceded. The parties never briefed, and the court of appeals never decided, whether "property of equivalent value" could be seized, and thus the issue could not have been "foreclosed" to the Petitioner in the present case, as claimed by the panel below.

cases cared whether the assets in question were tainted.

The Government adopts this position even after the Government's brief opposing certiorari admits the importance of "taint" in identifying the central holding of Caplin & Drysdale, as "[t]he Court ... explain[ed] that '[a] defendant has no Sixth Amendment right to spend **another person's money**' for legal fees..." Br. Opp. at 8 (emphasis added). Then, ignoring even its own analysis of Caplin & Drysdale, the Government displays supernatural insight into the mind of the Caplin & Drysdale and Monsanto Courts when it asserts as fact that the only issue the Court found "relevant" was not "taint[]" but rather that the assets "were forfeitable by statute." *Id.* at 9-10.

Since, under the Government's distinction-crushing approach, tainted and untainted assets are to be treated the same, the Government erroneously concludes this Court's rulings concerning the absence of a right to use tainted money to pay for defense counsel are fully applicable to untainted assets as well as to tainted funds. Clearly, that view cannot be supported by any reasonable reading of this Court's decisions.

III. ASSET FORFEITURE LAWS SHOULD BE VIEWED WITH DISFAVOR AND APPLIED NARROWLY.

At present, section 1345 applies to only three types of cases: (i) a conspiracy to defraud the United States or any agency thereof, including false statements

under 18 U.S.C. § 1001); (ii) a banking law violation; and (iii) a Federal health care offense. However, if past is prologue, there is every reason to believe that Congress could continue to expand the scope of this statute. If the Government's position that it may use this statute to seize not just tainted property, but also untainted property, is adopted, one could envision a serious weakening of the private federal criminal defense trial bar. Denied the opportunity to spend their own assets to hire an attorney on the open market, defendants would be totally reliant on federal public defenders. And all parties involved in meting out justice — judges, prosecutors, and defenders — increasingly will all look to the Government for their paychecks.

In the face of such a display of raw federal prosecutorial power, it becomes important to place the asset forfeiture power into the context of the realities of the modern federal criminal justice system. Until relatively recently, asset forfeiture was never considered to be a legitimate power of the federal Government. In her Petition for Certiorari, Petitioner recited some of this relevant history of forfeiture law in America. In response, the Government bristled and tried to slam the door shut on a historical perspective, asserting that "*in personam* forfeiture — the type of forfeiture at issue in both *Caplin & Drysdale* and *Monsanto* — is a **well-recognized penalty in criminal cases**." Br. Opp. at 11 (emphasis added). Instead, as the Government now attempts to expand its asset seizure and forfeiture powers, this Court should consider the present case in the context of the historically disfavored power of asset forfeiture.

A. Asset Forfeiture Was Disfavored by the Founders.

The doctrine of asset forfeiture can be traced to the reign of merciless Oriental despots who did not generally consider themselves to be constrained by any law.[11] Asset forfeiture has some predicate in early English common and statutory law, as Justice William J. Brennan succinctly summarized:

> At common law the value of an inanimate object directly or indirectly causing the accidental death of a King's subject was forfeited to the Crown as a **deodand**.... Forfeiture also resulted at common law from **conviction for felonies and treason**.... In addition, English Law provided for statutory forfeitures of offending objects used in violation of the **customs and revenue laws**.... [Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 663, 680-82 (1974) (emphasis added, footnotes omitted).]

In the United States, however, Justice Brennan explained that, except for *in rem* "forfeiture of commodities and vessels used in violations of customs and revenue laws" (*id.* at 683), criminal forfeiture was not favored:

> Deodands did not become part of the common-law tradition of this country.... Nor

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[11] *See, e.g.*, Karl Wittfogel, Oriental Despotism: A Comparative Study of Total Power (Vintage Books: 1981) 72-78.

> has forfeiture of estates as a consequence of federal criminal conviction been permitted.... Forfeiture of estates resulting from a conviction for treason has been constitutionally proscribed by Art. III, § 3, though forfeitures of estates for the lifetime of a traitor have been sanctioned.... [*Id.* at 682-83 (footnotes omitted).]

The first Congress prohibited "forfeiture of estate" for violation of any federal crime (Act of April 30, 1790, Sec. 24, 1 Stat. 112, 117), a statute that remained in effect (at least in part) until 1984, when it was repealed by the Comprehensive Forfeiture Act (Pub. L. 98-473). Until 1970, there was no federal criminal asset forfeiture statute of any sort. *See, e.g.*, United States v. Rubin, 559 F.2d 975, 991 (5th Cir. 1977) ("Indeed, the forfeiture of a portion of an individual's property as a consequence of a criminal conviction was unknown to the federal criminal law until the passage of [18 U.S.C.] § 1963. Such a penal foray bespeaks a need for circumspection.").[12]

Broad new criminal powers enacted in 1970 changed the course of federal criminal asset forfeiture.

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[12] *Cf.* United States v. Schmalfeldt, 657 F. Supp. 385 (W.D. Mich. 1987) ("The only exception was the Confiscation Act passed by the Radical Republican Congress in 1862 which authorized President Lincoln to forfeit the property of Confederate sympathizers. While the President doubted its constitutionality, the statute was ultimately upheld by the Supreme Court, not on the basis that criminal forfeitures were generally constitutional, but rather because the statute had been passed by virtue of Congress's War Powers." *Id.* at 387 (citations omitted).).

That year brought with it the Racketeer Influenced and Corrupt Organization's Act ("RICO"), section 901(a) of the Organized Crime Control Act of 1970, Pub. L. 91-452, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513. All three statutes included powers of criminal asset forfeiture, but none contained a power of pre-conviction seizure of assets which would be subject to forfeiture upon conviction.

Not until 1984 did amendments to these laws statutorily authorize *ex parte*, pretrial seizure of assets. *See* 18 U.S.C. § 1963(d); 21 U.S.C. § 853(e). Then, as part of the Civil Asset Forfeiture Reform Act of 2000, Congress extended criminal asset seizure and forfeiture to any criminal case where a civil or criminal forfeiture otherwise would be authorized. *See* 28 U.S.C. § 2461(c). This expansion of authority has resulted in a dramatic increase in criminal forfeiture judgments, which already had eclipsed civil forfeiture judgments in every year since FY 1995. *See* Congressional Research Service, "Crime and Forfeiture," No. 97-139, (Jan. 22, 2015) at 13 n.73.

B. The Modern Federal Criminal Justice System Operates Oppressively against the People of the United States.

In the last reported one-year period (ending March 2014), there were 89,403 criminal defendants whose cases were "disposed of" in the federal system.[13] Of

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[13] Administrative Office of the United States Courts, "Caseload Statistics 2014: Table D-4 Defendants Disposed of, by Type of

those, 7,319, or only 8.2 percent, were "Not Convicted," while 91.8 percent were "Convicted and Sentenced." *Id.* But of those who were convicted and sentenced, an amazing 80,111 — or 97.6 percent of total "convictions" — were concluded by a plea of guilty. *Id.*

There is a well-established trend toward capitulation of defendants to prosecutors; indeed, the percentage of convictions through guilty pleas had been 94.5 percent in 2001,[14] 92.3 percent in 1997,[15] and 84 percent in 1990.[16] In 1974, the percentage of resolutions through convictions was 60.5 percent, but just 33.7 percent in 1908. Michael O. Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts," 89 HARVARD L. REV. 293, 314 (Dec. 1975).

While there may be several reasons for the remarkable increase in guilty pleas, it is widely recognized that "[i]n most cases it is pressure — the promise of leniency in sentencing, a reduced charge, or the desire to avoid pretrial detention — that induces

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Disposition and Offense," http://www.uscourts.gov/file/10657/download

[14] http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2001/jun01/d04jun01.pdf.

[15] http://catalog.hathitrust.org/Record/003435589.

[16] G. Fields & J. Emshwiller, "Federal Guilty Pleas Soar As Bargains Trump Trials," *Wall Street Journal*, Sept. 23, 2012, http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html.

guilty pleas." Finkelstein, *supra*, p. 293. Additionally, prosecutors often over-charge crimes that they know they could never hope to prove beyond a reasonable doubt, so that they can retain bargaining power to accept guilty pleas for lower offenses.[17] *See, e.g., id.* at 294. Indeed, guilty pleas can "secure convictions that could not otherwise be obtained." *Id.* at 309. Prosecutors also "stack" charges for the same conduct, a practice which has been condoned by this Court, so long as each crime requires proof of an additional element that another does not.[18]

Public defenders at both state and federal levels are badly overworked, and it is "no wonder that many [public defenders can fall] into a 'meet 'em and plead

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[17] Overcharging is no problem for federal prosecutors when it comes to a trial, since juries are permitted to find defendants guilty of so-called "lesser included offenses," despite that practice's questionable constitutionality. *See, e.g.*, J. Shellenberger & J. Strazzella, "The Lesser Included Offense Doctrine and the Constitution," 79 MARQUETTE L. REV. 3 (Spring 1996). Indeed, this Court required states to permit juries to find lesser included offenses, recognizing that this "rule originally developed as an aid to the prosecution in cases in which the proof failed to establish some element of the crime charged," but believing that its operation "can also be beneficial to the defendant...." Beck v. Alabama, 447 U.S. 625, 633-34 (1980).

[18] *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) ("Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.").

'em' routine...."[19] Of course, it does not help that the prosecution's budget invariably exceeds that of the defense by several orders of magnitude. *Id.* Actual guilt, however, does not correlate directly with guilty pleas, even though the judicial system generally assumes "that defendants who were convicted on the basis of negotiated pleas of guilt would have been convicted had they elected to stand trial." Finkelstein, p. 293.

It is into this setting that the court of appeals yielded to the Department of Justice's demands for even greater power over defendants, and an even more dangerous tilt of the playing field, as even more defendants are stripped of the means to effectively defend themselves against federal prosecutors.

IV. AS APPLIED BY THE COURTS BELOW TO FREEZE HER UNTAINTED ASSETS, 18 U.S.C. § 1345 VIOLATES PETITIONER'S SIXTH AMENDMENT RIGHT "TO HAVE THE ASSISTANCE OF COUNSEL FOR [HER] DEFENSE."

Pursuant to its interpretation of 18 U.S.C. § 1345(a)(2)(B)(ii), "the Eleventh Circuit upheld an injunction that currently prohibits petitioner from spending any of her assets, including undisputedly untainted funds needed by her to engage private

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[19] H. Levintova, J. Lee, and B. Brownell, "Why You're in Deep Trouble If You Can't Afford a Lawyer," *Mother Jones* (May 6, 2013). http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts.

counsel in a related criminal case." Pet. Br. at 4. Petitioner contends that, as applied to her, § 1345(a)(2)(B)(ii) deprives her of her Sixth Amendment constitutional right to the assistance of counsel for her defense in the criminal case. Petitioner is correct.

A. The Sixth Amendment Secures a Preexisting Right of the Assistance of Counsel in All Criminal Cases.

The Sixth Amendment guarantee of the right "in all criminal prosecutions ... to have the Assistance of Counsel for his defense" – like all the rights spelled out in the 1791 federal Bill of Rights[20] — protects a preexisting right. Indeed, the right to counsel was recognized in the colonies as far back as 1701 in the Pennsylvania Charter of Privileges. *See* Powell v. Alabama, 287 U.S. 45, 61 (1932). In an abrupt departure from a long-established English rule that denied counsel to defendants in serious criminal cases, "[a] marked advance over English law was made by Article V [of the Pennsylvania Charter], which provided that criminals should have the **same right to counsel as their prosecutors**." Sources of Our Liberties, p. 252 (R. Perry & J. Cooper, eds., Rev. 2d ed., ABA Foundation 1978) (emphasis added). In England, while "[p]ersons charged with misdemeanors were allowed counsel," it was not until 1836 that "by act of Parliament the full right was granted in respect of felonies generally." Powell at 60. "But to the credit

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[20] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 657 (2008).

of her American colonies ... so oppressive a doctrine ... never obtained a foothold []here." *See id.* at 65.

Indeed, the English rule was "rejected by the colonies [b]efore the adoption of the federal Constitution." Powell at 61. After surveying the State constitutions and practices that preceded its ratification, this Court concluded "that in at least twelve of the thirteen colonies the rule of the English common law ... had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes...." *Id.* at 64-65.

While there were some variations among the states, and between the states and the federal bill of rights, there is no question that, by 1791, the right to assistance of counsel extended to "all criminal prosecutions," without exception. As this Court in Powell observed, quoting from Thomas Cooley's great treatise on Constitutional Limitations: "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel." Powell at 70.

B. The Right to Assistance of Counsel Secured by the Sixth Amendment Is Absolutely Essential to Ensure Petitioner a Fair Trial.

As it was first recognized in the American colonies, the right to assistance of counsel limited the criminal defendant's choice of counsel. The 1641 Massachusetts

Body of Liberties allowed the defendant the "Libertie to imploy any man against whom the Court **doth not except**, to helpe him, Provided he give him **noe fee or reward** for his paines." Sources at 151 (emphasis added). Under this provision, the choice of counsel was subject to judicial veto. Further, the defendant could not compensate his counsel for his services.

These twin limits were lifted in the 1701 Pennsylvania Charter of Privilege, which not only allowed the defendant to engage defense counsel of his choice, but to enjoy the "same Privileges of **Witnesses and Council** as their Prosecutors." Sources at 258 (emphasis added). In its coupling the privilege of calling witnesses with the right to employ counsel, the Pennsylvania Charter marked the beginning of recognition that the right to the assistance of counsel was inextricably intertwined with other rights deemed necessary to a fair trial. Hence, Article IX of the 1776 Pennsylvania Constitution read:

> That in all prosecutions for criminal offences, a man hath a right to be heard by himself and his council, to demand the cause and nature of his accusation, to be confronted with the witnesses, to call for evidence in his favour, and a speedy trial, by an impartial jury ...; nor can he be compelled to give evidence against himself; nor can any man be justly deprived of his liberty except by the laws of the land, or the judgment of his peers. [Constitution of Pennsylvania, Art. IX in Sources at 330.]

Subsequent state constitutions continued this pattern,[21] leading ultimately to the Sixth Amendment itself, which reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

Thus, as this Court observed in Johnson v. Zerbst, 304 U.S. 458 (1938), the right to assistance of counsel, alongside the other rights listed in the Sixth Amendment, "is one of the safeguards ... deemed **necessary** to insure fundamental human rights of life and liberty." *Id.* at 462 (emphasis added). Indeed, six years before Zerbst, Justice Sutherland celebrated the constitutional guarantee of right to counsel with the observation that, without the assistance of one trained in the law, even the most "intelligent and educated layman has small and sometimes no skill in the science of law," such that:

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[21] *See, e.g.*, Delaware Declaration of Rights, Sect. 14 (Sept. 11, 1776), reprinted in Sources at 339; Constitution of Maryland, Article XIX (Nov. 3, 1776), reprinted in Sources at 348; and Constitution of Vermont, Article X (July 8, 1777), reprinted in Sources at 366.

> If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. [Powell at 69.]

In short, as Chief Justice Roberts has recently observed: "[T]o have the Assistance of Counsel for his defence ... is the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys." Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1107 (2014) (Roberts, C.J., dissenting).

C. The Right to Assistance of Counsel Requires Giving Petitioner a Fair Opportunity to Secure Defense Counsel of Her Choice.

In 1963 in Gideon v. Wainwright, 372 U.S. 335 (1963), this Court ruled "that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial

unless counsel is provided for him." *Id.* at 344. Thus, the Court ruled that counsel must be appointed to represent those defendants who cannot afford to hire a lawyer. Otherwise, the guarantee would fall short of its scope, a right to be enjoyed in "all criminal prosecutions," not just in those cases where a defendant has been able to secure assistance of counsel.

It would be a mistake, however, to think that this Court is only concerned with those who cannot afford to purchase the services of a lawyer. Rather, as this Court had decided 31 years before Gideon, the right secured by the Sixth Amendment is one that "afford[s] a fair opportunity to secure counsel of **his own choice**." Powell at 53 (emphasis added). Thus, the right declared in Gideon only completed the picture of a flourishing market of able lawyers available to those who could afford to pay their fees. Indeed, the Gideon Court extolled the virtues of the free market system to have created a vital and vigorous defense bar:

> [t]hat government hires lawyers to prosecute and **defendants who have the money hire lawyers to defend** are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. [*Id.* at 344 (emphasis added).]

Since Gideon, this Court has affirmed that the "right to select counsel of one's choice [is] the root

meaning of the constitutional guarantee." United States v. Gonzales-Lopez, 548 U.S. 140, 147-48 (2006). And, further, as explained by this Court, "the Sixth Amendment right to counsel of choice" does not command that a "trial be fair," but "that the accused be defended by the counsel he believes to be best." *Id.* at 146. To be sure, this laissez-faire principle has its limits, but as Chief Justice Roberts asserted in his Kaley dissent, "none of those limitations is imposed at the unreviewable discretion of a prosecutor — the party who wants the defendant to lose at trial." Kaley at 1107. Nor should the right to counsel be subject to the discretion of the Court, lest the right to counsel of one's choice revert all the way back to the 1641 Massachusetts Body of Liberties, which conferred upon the court the unfettered power to veto a defendant's choice of counsel. *See* Sources at 151.

Under the Government's theory, the prosecution would continue to be free to employ all the assets it needs to build a case against Petitioner, while Petitioner would be denied full use of her untainted assets for her defense. This constitutes a step backwards from the principle of equivalency expressed in Article V of the 1701 Charter of Privileges, which secured "that all criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." *See* Sources at 258. If the prosecution, with the assistance of the court, is allowed to exercise the type of broad authority to tie up a criminal defendant's untainted assets, 18 U.S.C. § 1345 will present an open invitation to an ever more powerful federal government to deprive defendants in criminal cases of counsel of their choice, in violation of the Sixth

Amendment, and ultimately to the undermining of the entire federal criminal justice system.

CONCLUSION

For the reasons stated above, the decision of the Eleventh Circuit should be reversed.

Respectfully submitted,

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SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violates the Fifth and Sixth Amendments.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA") submits this brief in support of petitioner Sila Luis. Although the ABA takes no position on the merits of Ms. Luis' underlying criminal case, the ABA respectfully submits that the Fifth and Sixth Amendments preclude an expansion of the government's use of pretrial restraint orders to freeze a defendant's lawfully obtained, untainted assets that are needed to retain and pay counsel of choice.

The ABA is one of the largest voluntary professional membership organizations and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all fifty states, the District of Columbia, the U.S. Territories, and other jurisdictions, and include prosecutors, public defenders, private defense counsel, and appellate lawyers. They also include attorneys in law firms, corporations, non-profit organizations, and governmental agencies, as well as judges, legislators, law professors, law students and non-lawyer associates in related fields.[2]

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person, other than the *amicus curiae*, its members, and its counsel made any monetary contribution to is preparation and submission. The parties have consented to this filing.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor

Since its founding in 1878, the ABA has worked to protect the rights guaranteed by the Constitution, including the rights of criminal defendants to Due Process and to retain counsel of choice. Of particular relevance to the issues in this case are the ABA's standards and rules of professional conduct that promote the competence, ethical conduct and professionalism of lawyers. These considerations provide the foundation for the ABA MODEL RULES OF PROFESSIONAL CONDUCT ("ABA Model Rules"),[3] which are intended to apply at all times, including when lawyers are representing defendants whose assets have been frozen. Although authority for regulation of lawyers is vested primarily in the courts of the licensing jurisdictions, the ABA Model Rules are

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was it circulated to any member of the Judicial Division Council before filing.

[3] The ABA Model Rules are available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. First adopted as ABA policy in 1908 as the CANONS OF PROFESSIONAL ETHICS, they have been continuously amended and updated through the efforts of ABA members, national, state and local bar organizations, academicians, practicing lawyers, and the judiciary. A Model Rule becomes ABA policy only after it is approved by the ABA House of Delegates, which is composed of 560 delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members, and the Attorney General of the United States, among others. See ABA General Information, *available at* http://www.americanbar.org/groups/leadership/delegates.html.

intended as a national framework for assuring professional competence and ethical conduct.[4]

These same considerations are reflected in the ABA STANDARDS FOR CRIMINAL JUSTICE ("Criminal Justice Standards").[5] While they do not purport to establish the constitutional baseline for effective assistance of counsel, *see Rompilla v. Beard*, 545 U.S. 374, 399 (2005) (Kennedy, J., dissenting), this Court has recognized them as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1482 (2010). *See also Strickland v. Washington*, 466 U.S. 668, 688 (1984)) ("Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what [performance of counsel] is reasonable").

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[4] Except for California, each State and the District of Columbia has adopted a version of the ABA Model Rules and its numbering system. In addition, the highest courts of the United States Virgin Islands and American Samoa have stated that the conduct of lawyers in their territories is governed by the ABA Model Rules.

[5] The Criminal Justice Standards are *available at* http://www.americanbar.org/groups/criminal_justice/policy/standards.html; *see also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009). They have been developed and revised by the ABA Criminal Justice Section, working through broadly representative task forces made up of prosecutors, defense lawyers, judges, academics, and members of the public and other groups with a special interest in the subject. Like the ABA Model Rules, they must be approved by vote of the ABA House of Delegates before they become ABA policy.

The ABA Model Rules and Criminal Justice Standards have provided the basis for the ABA's decades-long examination of the relationship between the legal profession's obligations and the Fifth and Sixth Amendment rights of an accused to retain counsel of choice. The results of that examination led the ABA to file amicus briefs in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), and *United States v. Monsanto*, 491 U.S. 617 (1989),[6] and in *Kaley v. United States*, 134 S. Ct. 1090 (2014).[7] Based on that examination, the ABA now submits that the Fifth and Sixth Amendment rights of the accused, which are fundamental to our criminal justice system, preclude expansion of the government's ability to use pretrial restraints to encompass a defendant's lawfully obtained, untainted assets.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's decisions in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989), *United States v. Monsanto*, 491 U.S. 600 (1989), and *Kaley v. United States*, 134 S. Ct. 1090 (2014), explicitly distinguished between assets that were the proceeds of, or facilitated, criminal violations ("tainted" assets) and those that were not ("untainted" assets) in explaining why pretrial restraints on "tainted" assets could withstand Fifth and Sixth Amendment objections. This case

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[6] The ABA filed one amicus brief for both cases. That amicus brief is available at 1989 WL 1127836.

[7] Available at 2013 WL 3458156 (U.S.).

represents a profound expansion of the government's pretrial exercise of control over a defendant's assets. Unlike previous asset forfeiture cases this Court has considered, the pretrial restraining order in this case covers not only tainted assets, but also bars the use of lawfully obtained, untainted property to secure representation by counsel of choice.

That distinction is pivotal. First, the Eleventh Circuit was incorrect to conclude summarily that petitioner's challenge to pretrial restraints on lawfully obtained, untainted property was "foreclosed" by *Caplin & Drysdale*, *Monsanto*, and *Kaley*. *See* Pet. App. 3. Second, in disregarding that distinction, the Eleventh Circuit ignored the principal legal basis upon which, as *Kaley* observed, a defendant can contest a pretrial asset freeze order—the traceability of assets to the alleged offense. *Kaley*, 134 S. Ct. at 1099 n.9. If, along with any "tainted" assets, defendants are also prevented pretrial from using their lawfully obtained assets to retain counsel of choice, then there is no practical purpose to challenging "traceability," and *all* of the accused's assets are potentially unavailable to retain counsel.

Third, the ramifications for the criminal justice system of permitting pretrial restraint of untainted assets are pervasive and uniquely harmful. If the government can restrain pretrial a defendant's use of untainted assets to retain counsel of choice, then the government is effectively granted the capability to deprive the accused of counsel of choice. Because lawyers will not know whether or when the

government may make a defendant's untainted assets unavailable, they would accept the representation risking violation of their professional ethical codes by entering into what may become, at any time, a contingent-fee arrangement that is dependent on the outcome of the trial. The risk of losing counsel of choice under such circumstances is widely recognized to discourage candor and interfere with formation of an attorney-client relationship. Even if lawyers agree to continue the representations pro bono, or the accused must accept court-appointed counsel, such defendants are disadvantaged because their lawyers will have limited resources available for conducting research and investigations, and for developing strategies for defense, for negotiations with the prosecution, and for conducting trial. Moreover, if the defendant is found not guilty, or the government is otherwise found not entitled to untainted assets that were needed for payment of counsel of choice, the defendant's deprivation of counsel of choice is a structural error that cannot be cured. *United States v. Gonzalez-Lopez*, 547 U.S. 140, 148 (2006) ("Deprivation of the right [to be assisted by counsel of choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants").

The Eleventh Circuit's conclusion is all the more incorrect because the relevant statutory language contains no indication that Congress intended to abridge Fifth and Sixth Amendment rights. In these circumstances, there is no basis for attributing to Congress such a constitutionally infirm intent.

ARGUMENT

DUE PROCESS AND THE SIXTH AMENDMENT RIGHT TO COUNSEL OF CHOICE PRECLUDE PRETRIAL RESTRAINTS ON A CRIMINAL DEFENDANT'S USE OF LAWFULLY OBTAINED ASSETS TO RETAIN COUNSEL

A. Pretrial Restraint of Untainted Assets Needed to Retain Counsel Effectively Precludes Defendants From Exercising Their Constitutional Right to Counsel of Choice

When an indictment charges an offense for which a defendant's assets may be subject to forfeiture upon conviction as alleged proceeds or instrumentalities of the offense, it is now routine for the government to seek a pretrial order restraining those assets. Although a defendant is presumed innocent, a pretrial order that restrains assets needed to pay counsel effectively precludes the defendant from exercising core Sixth Amendment rights at a critical time. "[T]he choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." *Gonzalez-Lopez*, 548 U.S. at 150. It will affect "strateg[y] with regard to investigation and discovery, development of the theory of defense, [and] selection of the jury." *Id.* Both before and after the return of an indictment, a defendant has no more essential or important resource than the guidance and independent judgment of counsel who is intimately familiar with

the case. Indeed, selection of counsel may be the most important contribution a defendant makes to her defense. *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (citing *Faretta v. California*, 422 U.S. 806 (1975); *Brooks v. Tennessee*, 406 U.S. 605 (1972)).

Pretrial freezing of untainted assets needed to retain counsel is a concern not only for the defendant, but for counsel, the courts, and the criminal justice system. When a defendant's wholly legitimate assets are frozen prior to trial, counsel may have to continue the representation pro bono or withdraw, leaving the client unrepresented at a particularly vulnerable time or forced to start over with newly appointed counsel with no knowledge of the case and with whom the client has no established relationship of confidence and confidentiality. Otherwise, the attorney-client relationship would be transformed into a contingency fee arrangement that depends on the outcome at trial, in violation of bedrock attorney ethics rules in every State.[8] As ABA Model Rule 1.5(d)(2) states, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." *See also* ABA, Model Rule 1.7(b) (representation barred by conflict where lawyer

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[8] The state rules of professional conduct are available at: http://www.americanbar.org/groups/professional-responsibility/resources/links_of_interest.html. A comparison of individual ABA Model Rules to each of the state rules can be found at: http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html. *See also* Geoffrey C. Hazard, Jr., & Susan P. Koniak, *The Law and Ethics of Lawyering* 508 (1990) ("All states prohibit contingent fees for the defense of a criminal case").

representation limited by material personal interest); ABA Criminal Justice Standard 4-3.4(k) ("Defense counsel should not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case or in a criminal forfeiture action"). Consistent with these principles, courts have held that contingent fee arrangements create an actual conflict of interest that compromises the independence of counsel. *E.g., Winkler v. Keane*, 7 F.3d 304, 307-08 (2d Cir. 1993) (noting that contingent fee created a disincentive for counsel to seek a plea agreement or to pursue mitigating defenses that would have resulted in conviction for a lesser offense); *Ibn-Tama v. United States*, 407 A.2d 626 (D.C. 1979) (vacating murder conviction where contingent fee arrangement and actions of counsel had "completely ruptured and torn asunder" the attorney-client relationship).

The Justices of this Court unanimously recognized, in the majority and dissenting opinions in *Kaley*, that the right to choose counsel prior to a criminal trial is of "vital interest" to the defendant, and is, in fact, the "root meaning" of the Sixth Amendment that "matters profoundly." *Compare Kaley*, 134 S. Ct. at 1102 (citing *United States v. Gonzalez-Lopez*, 547 U.S. 140, 146 (2006)), *with id.* at 1114-15 (Roberts, C.J., dissenting) ("Granting the Government the right to take away a defendant's chosen advocate strikes at the heart of [the] significant role" of the "independent bar as a check on prosecutorial abuse and government overreaching").

Pretrial deprivation of the right to counsel of choice by freezing defendant's lawfully obtained property that is needed for payment of counsel has such deleterious practical consequences that it has been described as a "'nuclear weapon' of the law." *United States v. Ramilovic*, 419 F.3d 134, 137 (2d Cir. 2005) (quoting *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999)). Most significantly, a defendant subject to pretrial restraint of assets may find that counsel of choice is simply unobtainable when, as under the decision below, *none* of a defendant's assets are beyond the control and discretion of the prosecution. And when the government alleges joint and several liability against conspirators, the amount sought through forfeiture may exceed the defendant's total assets, making *all* her assets subject to pretrial restraint. *See, e.g., United States v. Cano-Flores*, 2015 WL 4666891 (D.C. Cir. Aug. 7, 2015) at *16 ("Forfeiture amounts calculated under the government's view may consist almost entirely of the amounts that the defendant never obtained").

Even if counsel could be found who would accept an engagement in these circumstances, the potential that the attorney-client relationship will become a contingent fee arrangement can impede the development of the trust needed for effective assistance of defense counsel.[9] Where a pretrial

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[9] In plea bargain negotiations, for example, the attorney's potential conflict of interest becomes more concrete when a defendant is offered the opportunity to plead guilty to a lesser offense that would financially disadvantage his lawyer by forfeiting funds that would otherwise be available to pay counsel.

freeze of lawfully obtained assets puts counsel's continued participation at risk, defendants and courts face the prospect of having to replace counsel at a time of the prosecutor's choosing, even as late as the eve of trial. In those circumstances, defendants and the criminal justice system as a whole bear the burden of replacement counsel who have had less or even insufficient time to prepare the defense. The prospect of governmental veto casts a cloud over the effective representation provided by counsel.

As this Court held in *Gonzalez-Lopez*, a violation of the Sixth Amendment right to *counsel of choice* is not cured by the substitution of *effective* counsel to conduct the trial. "Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." 548 U.S. at 148; *id.* at 146 (Sixth Amendment guarantees right to be "defended by the counsel he believes to be best," for which "[n]o additional showing of prejudice is required to make the violation 'complete'"). Denial of this right is

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E.g., *Winkler v. Keane*, 7 F.3d at 307-08; *see also* Pamela Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 715-17 (1991) (discussing additional ways contingent fee arrangements undermine the attorney-client relationship). Conflicts of interest are not limited to the ramifications of impending contingency. *See, e.g.*, *United States v. Cosme*, 2015 WL 4716437 (2d Cir. Aug. 10, 2015) at *2 ("attorney asked to be relieved because of the conflict between his position as a court-appointed lawyer and [defendant's] potential *Monsanto* hearing, the purpose of which would be to obtain the release of seized funds in order to hire a replacement lawyer").

among "'a very limited class of errors' that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole." *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013) (quoting *United States v. Marcus*, 560 U.S. 258 (2010)). It is deemed "structural" error because "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Gonzales-Lopez*, 548 U.S. at 150.

If defendants in criminal proceedings are unable to use their legally obtained, untainted property to retain private counsel, then accepted notions of effective assistance of counsel, the right to counsel of choice, and a balanced adversary system will have undergone a transformative shift. The right to counsel will be eroded because it will depend on what the government is willing to permit for a particular defendant. In addition, forcing an otherwise non-indigent defendant to accept appointed counsel places an additional strain on the already limited resources available for representing the truly indigent, to the further detriment of the criminal justice system.[10]

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[10] A likely consequence of freezing assets that otherwise would be available to pay retained counsel is that courts will have to appoint attorneys at government expense. But a defendant who is restrained from using lawfully-obtained assets to pay an attorney, even as he retains title to the frozen assets (until such time when, post-conviction, they may be forfeited), may be deemed non-indigent, and thus ineligible for appointed counsel. Thus, the power to restrain untainted assets pretrial potentially confers on prosecutors the authority to create a constitutionally unacceptable, counsel-deprived limbo. The risk is not

B. Pretrial Restraint on Legally Obtained Assets Needed to Retain Counsel of Choice is Contrary to this Court's Sixth Amendment Precedents

This Court's repeated reliance on the nexus between the assets and the offense charged to justify pretrial restraints is central to the constitutional analysis. Since 1989, this Court has addressed—in *Caplin & Drysdale, Monsanto* and *Kaley*—potential conflicts between the government's use of its statutory criminal forfeiture authority and the constitutional role of the right of counsel in the administration of our criminal justice system. In those three cases, the Court upheld the unambiguous statutory authority to restrain pretrial—and ultimately forfeit post-conviction—only *tainted* property in the face of claims that such property should be available to retain counsel. *See, e.g., Kaley*, 134 S. Ct. at 1096 (describing and quoting *Caplin & Drysdale* as holding "the Government does not violate the Constitution if, pursuant to the forfeiture statute, 'it seizes the robbery proceeds and refuses to permit the defendant to use them' to pay for his lawyer").

Caplin & Drysdale arose after conviction, and

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hypothetical. Only persons "financially unable" to pay for retained counsel are entitled to appointed counsel, 18 U.S.C. § 3006A, and their proof of indigence is made on pain of perjury. *United States v. Kahan*, 415 U.S. 239, 243 (1974). A trial court may exclude restrained or forfeitable assets from this determination, or it may not. *United States v. Salemme*, 985 F. Supp. 197, 203 (D. Mass. 1997) (excluding some forfeitable property from financial disclosure requirements but not others).

there was no dispute that the drug proceeds—which had already been found to be drug proceeds pursuant to a guilty plea—were both tainted and actually forfeited. *See In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637, 641-42 (4th Cir. 1988)) (en banc), *aff'd*, 491 U.S. 617 (1989). In upholding the post-conviction forfeiture, this Court's majority opinion cited and relied on the relation-back doctrine, a common law principle codified in federal forfeiture statutes and identified by this Court as the "'taint theory' ... long recognized in forfeiture cases." 491 U.S. at 627 (citing *United States v. Stowell*, 133 U.S. 1 (1890) and quoting legislative history). Under the relation-back doctrine, title to tainted property (*i.e.*, drug proceeds) automatically becomes vested in the government at the time it is used unlawfully. *Id.*[11] Thus, as the Court explained, the tainted property at issue belonged to the government and the defendant never had lawful ownership of it.

In reaching that conclusion, *Caplin & Drysdale* delineated the constitutional boundaries of the Sixth Amendment's protection of the right to retain counsel of choice: it "does not go beyond the *individual's right to spend his own money* to obtain the advice and assistance of counsel." 491 U.S. at 626 (quoting *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 370 (1985) (ellipsis in original, emphasis added). This pivotal distinction between tainted and untainted assets was reaffirmed in *Kaley*: "stolen money" and "ill-gotten gains" cannot be used to defend the robbery suspect because "[t]hat money is not

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[11] 21 U.S.C. § 853(c) (vesting interest in tainted property "upon commission of the act giving rise to forfeiture").

rightfully his," and he "has no Sixth Amendment right to spend another person's money for legal fees." *Kaley*, 134 S. Ct. at 1096-97 (quoting *Caplin & Drysdale*)); *id.* at 1097 ("no one contests that the assets in question derive from, or were used in committing, the offenses").[12]

In *Caplin & Drysdale, Monsanto* and *Kaley*, the relevant interest the Court identified in the pretrial restraint context was not any government interest in untainted assets, but rather was limited to securing "'ill-gotten gains'" or "'stolen assets.'" Similarly, both the majority and dissenting opinions in *Kaley* recognized an appropriate role for a pretrial hearing to identify traceable assets. 134 S. Ct. at 1095 n.3 (Government agreed that defendant has a constitutional right to a hearing on traceability); *id.* at 1111 (Roberts, C.J., dissenting) ("the Government concedes that due process guarantees defendants a hearing to contest the traceability of the restrained assets to the charged conduct").

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[12] *See Kaley*, 134 S.Ct. at 1096 (noting that the district court had excluded from the asset freeze order in that case "$63,000 that it found (based on the parties' written submissions) was not connected to the alleged offenses").

C. The Speculative, Attenuated Interest in Untainted Assets as to Which the Government Might Have a Claim Only After Conviction and Meeting Other Statutory Requirements Does Not Overcome a Defendant's Immediate, Vested Sixth Amendment Right to Use Untainted Property to Engage Counsel of Choice

Legally acquired property should be available to permit the accused to control her defense through selection of counsel. As this Court held in *Gonzalez-Lopez*, and reaffirmed in *Kaley*, a defendant's right to choose counsel is irretrievably lost if denied prior to trial. *Kaley*, 134 S. Ct. at 1102 (citing *Gonzalez-Lopez*); *accord, id.* at 1113-14 ("the right to counsel of choice is inherently transient, and the deprivation of that right effectively permanent") (Roberts, C.J., dissenting).

While the Sixth Amendment interests of a defendant are at their zenith pretrial, the government's contingent interests in a defendant's legitimate assets are at their nadir. No countervailing benefit to the government warrants an immediate and final abridgement of Sixth Amendment protections prior to trial by barring the use of lawfully acquired assets for retaining counsel. Viewed from this perspective, the government's pretrial interest is properly limited to "allegedly tainted assets." *Kaley*, 134 S. Ct. at 1112 (Roberts, C.J., dissenting, citing *Caplin & Drysdale*).

The government's remote general interest in satisfying a future criminal judgment from the defendant's untainted assets depends on three levels of contingency. First, it is contingent on whether the government prevails on the issue of criminality at a future trial. Second, it is contingent on the government prevailing at trial as to the tainted nature of the assets subject to forfeiture. Third, it is contingent on whether the government prevails in showing that the defendant possesses inadequate *tainted* assets to satisfy a forfeiture judgment and that "as a result of any act or omission of the defendant" the tainted assets (as listed in 21 U.S.C. § 853(a)) have been rendered unavailable for forfeiture. Only then has the government established authority to obtain the forfeiture of untainted substitute assets after conviction. 21 U.S.C. § 853(c); 18 U.S.C. § 982(b)(1). *See United States v. Jarvis*, 499 F.3d 1196, 1204-05 (10th Cir. 2007) (noting the government's "potential and speculative" interest prior to trial because "the United States does not have a ripened interest in substitute assets until (1) after the defendant's conviction, and (2) the court determines the defendant's § 853(a) forfeitable property is out of the government's reach for a reason enumerated in § 853(p)(1)(A)-(E)"). Those essential predicates for forfeiture do not exist prior to or during trial.

D. Congress Has Not Authorized Pretrial Restraints that Prevent a Defendant's Use of Her Own Lawfully Obtained Assets to Retain Counsel of Choice

The primacy of a defendant's right to use her own lawfully obtained assets to secure counsel should be all the more impervious to government intrusion because Congress has not endorsed the pretrial restraint of untainted assets. To be sure, Congress has provided a variety of statutory means to advance the government's interest in securing a post-conviction forfeiture judgment, including the relation-back doctrine, and pretrial restraints on *tainted* assets. But Congress has not provided statutory authority for the government to commandeer before trial a defendant's lawful assets needed to mount a criminal defense.

For example, Congress provided express statutory authority for pretrial orders restraining the use of tainted assets, which 21 U.S.C. § 853(a) defines to include property with a nexus to a crime. 21 U.S.C. § 853(e) (authorizing restraints to preserve the "property described in subsection (a) for forfeiture"). *See also* 18 U.S.C. § 982(b)(1) (adopting § 853 forfeiture provisions for other offenses).

Consistent with that statutory limitation, the circuit courts overwhelmingly have held that Congress did not authorize pretrial restraints on lawful "substitute assets." Those courts explained

that substitute assets are not included in § 853(e), which authorizes pretrial restraining orders *only* for the categories of tainted property expressly cross-referenced in § 853(a) (namely, proceeds and instrumentalities), while substitute assets are addressed only in the post-conviction *forfeiture* provision, 21 U.S.C. § 853(p). *See, e.g., United States v. Jarvis*, 499 F.3d at 1204 ("all but one federal court of appeals to address this issue has determined the legislative silence regarding substitute property in § 853(e) precludes pre-conviction restraint of substitute property"); *see also United States v. Parrett*, 530 F.3d 422, 430-31 (6th Cir. 2008) (statutory language does not permit substitute assets to be subject to pretrial restraint); *United States v. Pantelidis*, 335 F.3d 226, 234 (3d Cir. 2003); *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998); *United States v. Field*, 62 F.3d 246, 249 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *In re Assets of Martin*, 1 F.3d 1351, 1359 (3d Cir. 1993); *United States v. Floyd*, 992 F.2d 498, 500-02 (5th Cir. 1993);[13] Stefan Cassella, *Asset Forfeiture Law in the United States* §17.1 at 537 (2d ed. 2013) ("canons of statutory

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[13] While all these circuits reached this conclusion based on the plain language of § 853 and its counterpart, 18 U.S.C. § 982, some have noted that the legislative history of the substitute assets provisions confirms congressional intent not to include pretrial restraining order authority over substitute assets. *Ripinsky*, 20 F.3d at 364 n.7; *In re Assets of Martin*, 1 F.3d at 1360 (citing legislative history of predecessor Comprehensive Forfeiture bill, and holding that "Congress clearly intended to exclude substitute assets from property subject to preliminary restraints").

construction dictate the result reached by the majority of courts").[14]

In *Kaley*, this Court construed § 853's statutory restraining order authority in the same manner—concluding that Congress authorized pretrial restraints when "*the property at issue has the requisite connection to that crime. See* § 853(a)." *Kaley*, 134 S. Ct. at 1095 (emphasis added). Section 853(a) is, by definition, limited to tainted property that "has the requisite connection to that crime." *Id.*

The legislative history of the 1984 Comprehensive Forfeiture Act,[15] from which the restraining order provisions of § 853 originate, makes clear that Congress did not intend to abridge Sixth Amendment rights. *See* H.R. Rep. No. 98-845, pt. 1, p. 19 n.1 (1984) ("[n]othing" in 21 U.S.C. § 853 "is intended to interfere with a person's Sixth

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[14] The only arguably contrary authority, *In re Billman*, 915 F.2d 916 (4th Cir. 1990), did not involve funds used for criminal defense nor did it implicate any Sixth Amendment choice of counsel issue. The Fourth Circuit acknowledged that it did not have the benefit of any other circuit opinion on point, *id.*, and it did not conduct a plain language analysis of the statute that all other circuits would later employ to reach the opposite conclusion. When the Fourth Circuit eventually confronted this issue in a subsequent case, it held that the Sixth Amendment required a court to authorize use of untainted property for purposes of retaining counsel. *United States v. Farmer*, 274 F.3d 800, 802, 805 (4th Cir. 2001) (Wilkinson, J.) (holding that defendant has a Sixth Amendment right to use "untainted assets" for criminal defense and citing this Court's majority opinion in *Caplin & Drysdale*).

[15] Pub. L. No. 98-473, § 301, reprinted in 1984 U.S. Code & Ad. News (98 Stat.) 1837, 2040.

Amendment right to counsel"). This Court has construed the legislative history of the 1984 Comprehensive Forfeiture Act as a congressional acknowledgement of the Sixth Amendment issues potentially created by restraining orders, and an "exhortation for the courts to tread carefully in this delicate area." *Monsanto*, 491 U.S. at 609 n.8; *see also Caplin & Drysdale*, 491 U.S. at 636 (Blackmun, J., dissenting) (quoting this legislative history).

In conformity with its express language and stated policy, the statute should not be read to authorize government action that would raise grave constitutional questions. Accordingly, and consistent with this Court's construction of the statute and its legislative history, the circuit courts have held overwhelmingly that when Congress approved substitute assets forfeiture in 1986, it excluded pretrial restraints on substitute assets.[16] In so doing, Congress eliminated the prospect of a conflict between a defendant's Sixth Amendment right to choose counsel and the issuance of a pretrial restraining order to block the use of untainted assets for that purpose.

In this case, the government has not invoked the general pretrial restraint provisions authorized by Congress for criminal forfeiture cases, § 853(e). Rather, the government invoked a specialized statute

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[16] Statutory authority for substitute assets forfeiture was enacted as part of the Drug Possession Penalty Act of 1986, a title within the Anti-Drug Abuse Act of 1986. Pub. L. No. 99-570, title 1, §1153(a) & (b), 100 Stat. 3207-13 (1986).

dealing with injunctions against fraud, 18 U.S.C. § 1345, that is also aimed only at tainted assets—"property, obtained as a result of" a banking or health care violation. *Id.* § 1345(a)(2). More specifically, § 1345(a)(1)(C) authorizes the issuance of injunctions "to enjoin such violation" of banking or health care laws, and, if a person is "violating or about to violate" such a law, § 1345(a)(2) authorizes equitable relief when that person "is alienating or disposing of property, obtained as a result of" such a violation, or which "is traceable to such violation." *Id.* This language is clearly aimed at the use of equitable restraints to "prevent a continuing and substantial injury to the United States" by barring ongoing or prospective violations of banking or health care laws. 18 U.S.C. § 1345(b).[17] *See, e.g, United States v. Phillip Morris USA, Inc.*, 396 F.3d 1190, 1198-99 (D.C. Cir. 2005) (plain meaning of statute authorizing injunctions to "prevent and restrain" RICO violations is limited to prospective relief, and does not include prior violations) (citing *Meghris v. KFC Western, Inc.*, 516 U.S. 479, 488 (1996)).

In turn, § 1345(a)(2) is aimed at prospective transfers or alienations of "traceable" (*i.e.*, tainted) property. Temporary restraints are authorized in

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[17] Indeed, this Court has consistently held that imminent future injury is the sine qua non of equitable relief and the Article III jurisdiction to issue it. *Clapper v. Amnesty, Int'l USA*, 133 S. Ct. 1138, 1147 (2013); *City of Los Angeles v. Lyon*, 461 U.S. 95, 112 (1983). This Court has further held that federal courts lack inherent equitable authority to restrain assets prior to judgment. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 326 & n.8 (1999).

§1345(a)(2)(B) only with respect to imminent transfers of tainted assets. Lawfully obtained property spent on legal representation simply is not property traceable to an ongoing health care violation, nor to a transfer of traceable proceeds.

This plain-language, common-sense reading of §1345 is fully consistent with congressional failure to approve pretrial restraints on substitute assets, *Parrett*, 530 F.3d at 429-30, and with this Court's admonition not to construe statutes in a manner that would actually or potentially conflict with constitutional rights. *See, e.g., Skilling v. United States*, 561 U.S. 358, 406 (2010); *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); *United States v. Bass*, 404 U.S. 336, 349-350 (1971). This Court requires a clear statement from Congress that it intends such a constitutional conflict. *Id.*; *McNally v. United States*, 483 U.S. 350, 359-60 (1987). Congress must, at a minimum, speak clearly before it encumbers the right to counsel by pretrial freezing of the legitimate assets necessary to pay them.

The statutes involved in this case do not meet that standard. This conclusion is particularly compelling in this case because, when Congress spoke directly to the issue of untainted "substitute assets," it did not authorize restraint of such assets pretrial and permitted it only for post-conviction forfeitures. *See Jarvis*, 499 F.3d at 1204 (legislative silence

regarding substitute property in § 853(e) precludes pre-conviction restraint of substitute property).[18]

E. Due Process Protects a Defendant's Right to Use Lawful Assets for Her Criminal Defense

Prior restraints on a defendant's financial ability to defend herself by spending lawfully obtained assets also runs afoul of the Due Process Clause of the Fifth Amendment. The Due Process Clause guarantees that federal criminal proceedings will be fundamentally fair. *Estelle v. Williams*, 425 U.S. 501, 505 (1976). Moreover, due process protects both a defendant's substantive right to a fair trial, *Wardius v. Oregon*, 412 U.S. 470 (1973), and to fair criminal procedures. As Chief Justice Roberts observed in his dissent in *Kaley*, "[t]he possibility that the prosecutor could elect to hamstring his target by preventing him from paying his counsel of choice raises substantial concerns about the fairness of the entire proceeding." *Kaley*, 134 S.Ct. at 1107 (Roberts, C.J., dissenting) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Barring a defendant from using legitimate untainted assets to defend herself prior to and during trial undermines both components of due process.

The Due Process Clause speaks to "the balance of forces between the accused and his accuser." *Wardius*, 412 U.S. at 475. The right of counsel is a

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[18] *See* n.14, *supra*, discussing *In re Billman*, 915 F.2d 916 (4th Cir. 1990).

necessary component for a fair balance between the defendant and the government because an independent counsel is an essential ingredient of a fair trial. *Polk County v. Dodson*, 454 U.S. 312, 322 (1981). Prior restraints on untainted assets needed to pay attorneys' fees enable the government to determine who will be its adversary, to restrict the resources available to the defense, and even to determine when chosen counsel will be replaced with substitute counsel. The prospect of such restraints on untainted assets compromises the independence of counsel and places counsel's financial interests in conflict with the interests of the client. *See* pages 8-10, *supra*. Fundamental fairness demands that an accused person not be thus encumbered in presenting a defense. A system that grants one party the discretion to restrict and control the lawfully obtained resources available to its opponent is not the adversarial system that has existed throughout our history. The Constitution and the traditions of our criminal justice system demand that the government prevail by proving its allegations, not by impeding an accused's ability to mount a defense.

Under the decision below, a lifetime of lawful labor offers no protection against the loss of the right to counsel of choice precisely when it is of the most value to the accused. For these reasons, the decision of the Eleventh Circuit tilts the scales sharply—and incorrectly—in favor of the prosecution. That is an imbalance our Constitution should not abide.

CONCLUSION

The American Bar Association respectfully requests that the judgment of the Eleventh Circuit be reversed.

Respectfully submitted.

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Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR FORFEITURE REFORM IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Americans for Forfeiture Reform[1] ("AFR" or "Amicus") is a non-profit, non-partisan civic group concerned with the government's fearsome power to forfeit private property—a power that is "devastating when used unjustly." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989). AFR thus seeks to increase public awareness of government abuses of this power and the urgent need for legal reform. AFR advances this mission through, among other things, filing *amicus curiae* briefs in forfeiture cases.[2]

AFR is interested in the present case because forfeitures "should be enforced only when within both letter and spirit of the law." *United States v. One 1936 Model Ford V-8 De Luxe Coach*, 307 U.S. 219, 226 (1939). Here, a district court imposed a blanket freeze on Petitioner's property based on an erroneous interpretation of a highly limited forfeiture law. AFR therefore believes the Court should use this case to

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[1] This brief is filed based on Petitioner's written blanket consent filed with this Court and Respondent's written consent to Amicus. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Amicus and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Americans for Forfeiture Reform, *United States v. Moser*, No. 13-55266 (9th Cir. Nov. 1, 2013); *see also United States v. Moser*, No. 13-55266 (9th Cir. Feb. 5, 2015) (order granting AFR's motion under Fed. R. App. P. 29(g) for permission to participate in oral argument).

reaffirm the level of care that courts should take when interpreting and enforcing forfeiture laws.

SUMMARY OF THE ARGUMENT

The freezing or forfeiture of private property is an "exceedingly drastic" government act that has long been disfavored under common law. *One 1936 Model Ford*, 307 U.S. at 226. The government thus may not freeze or forfeit property absent clear legal authority to do so. But no such authority existed in this case—a reality made clear by the hypothetical that the district court offered here to explain why effectively freezing all of Petitioner's property did not violate her Sixth Amendment right to counsel.

The hypothetical went as follows: imagine a suspect is arrested following a $100,000 bank robbery with $100,000 on him and no good account of where this cash came from. *See* P.App.31-32. It would be "reasonable" to deny the suspect use of the $100,000 to pay for a lawyer as it is "obvious" the cash does not belong to the suspect. *Id.* But what if the suspect had already spent the $100,000 before his arrest but also had another $100,000 in legitimate savings? *Id.* The court reasoned that it would be just as fair to deny the suspect the use of his savings to pay for a lawyer as his "decision to spend the $100,000 he stole" could not free him "to hire counsel with the other $100,000 when Congress has authorized restraint of [his] substitute assets." *Id.*

But this logic runs smack into what Congress has actually authorized. Under the Fraud Injunction Act, 18 U.S.C. § 1345—the statute that the district court found authorized a blanket $45 million freeze on Petitioner's property in this case—federal courts may freeze assets only when a person is "alienating or disposing of property, or intends to alienate or dispose of property" that is traceable to certain federal offenses. *Id.* § 1345(a)(2). The Act thus could not authorize a freeze on the hypothetical suspect described above because this suspect *no longer has any property traceable to a federal offense* that he can alienate, much less intend to alienate.

There lies the fundamental problem with the $45 million freeze that was imposed on Petitioner here. Despite the exceedingly drastic nature of this freeze, neither the district court originally nor the Eleventh Circuit on appeal considered whether this freeze was authorized by the full text of the Fraud Injunction Act. *See* P.App.2, 9-11. Both courts instead largely assumed the Act did exactly what the government wanted it to do in this case: ensure that when some assets allegedly "obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead." P.App.10.

The Act's text, historical purpose, schematic role, as well as governing legal canons, paint a different picture. Under the Act, a court may freeze *actually tainted property*—i.e., property traceable to a federal offense. Or a court may freeze *constructively tainted property*—i.e., property that is not connected to any

crime but is equal in value to the actually tainted property that a person currently possesses. This untainted property is thus deemed "tainted" by the court either to preserve the status quo (e.g., freezing $100,000 in untainted cash instead of a $100,000 tainted car at risk of depreciation) or to protect third parties who would be harmed if a person's tainted property were to be frozen. At all times, however, the Act requires a freeze to be tied to tainted property that a person *presently holds* (and thus can alienate).

Hence, the Act does not authorize the freezing of a person's untainted property based on the sum value of property that a person may have improperly obtained or used *in the past*. Or, in concrete terms, the Act does not permit a $100,000 freeze on John Doe's bank accounts because Doe allegedly defrauded the government of $100,000 five years ago. The Act instead requires the government to show the total amount of money in Doe's accounts that is traceable to the alleged fraud *today* (whether $1 or $100,000) and further show that Doe intends to spend this tainted cash. The Act then enables the court to freeze *either* the tainted cash *or* untainted property belonging to Doe of equivalent value—but not both.

That is what should have happened here. But instead, the district court accepted the government's charge that Petitioner improperly took $45 million from Medicare between 2006 and 2012, and then imposed a sweeping $45 million freeze on all of Petitioner's property without determining whether any of this property was *actually traceable* to Petitioner's

alleged fraud (i.e., tainted) or not. *See* P.App.6, 13. The district court thus failed to acquit its fundamental responsibility when enforcing a forfeiture-related law like the Fraud Injunction Act—to ensure that its order fell "within both letter and spirit of the law." *One 1936 Model Ford*, 307 U.S. at 226. The following plain interpretation of the Act, in turn, exposes the gravity of this error and a clear way to fix it that avoids the constitutional problems spawned by this error.

ARGUMENT

I. The Fraud Injunction Act ("FIA") allows a court to freeze only tainted property—the Act does not govern untainted property.

The Fraud Injunction Act, 18 U.S.C. § 1345, empowers the Attorney General to enjoin people from committing certain fraud-based federal offenses and from dissipating property traceable to these offenses (i.e., "tainted property"). The Act does not, however, enable the Attorney General to obtain "the functional equivalent of an order of attachment" against all of a defendant's property. *United States v. Jones*, 652 F. Supp. 1559, 1560 (S.D.N.Y. 1986). Indeed, as detailed below, a plain reading of the Act reveals that in authorizing property freezes, the Act is not concerned with how much property the accused may have illegally taken—it is only concerned with how much illegal property the accused *actually has*.

A. The FIA lets a court freeze a person's property only if the property is "traceable to" fraud (i.e., tainted).

To understand the property freezes authorized by section (a)(2) of the Fraud Injunction Act, the entire Act must be considered. The Act's first major section states "the Attorney General may commence a civil action in any Federal court to enjoin": (1) a person who is "violating or about to violate" any anti-fraud provision under Chapter 63 of Title 18 of the U.S. Code; (2) a person who is "committing or about to commit a banking law violation"; and (3) a person who is "committing or about to commit a Federal health care offense." 18 U.S.C. § 1345(a)(1).

The point of § 1345(a)(1), then, is to enable the Attorney General to stop fraudulent conduct *before* or *while* it is happening—not to remediate such conduct after the fact. This is reflected by the consistent use of the present tense in § 1345(a)(1), which authorizes injunctions against people who are "committing" or who are "about to commit" certain violations, versus speaking of people who *have committed* a violation. *Cf., e.g.*, 42 U.S.C. § 1320a-7a(k) (allowing injunctive relief against any person who "has engaged" in health care fraud). Federal courts have thus limited any grant of injunctive relief under § 1345(a)(1) to situations where the alleged fraudulent scheme to be stopped is "ongoing and there exists a threat of continued perpetration," thereby emphasizing that "the statutory equitable remedy [under § 1345] is not available for solely past violations." *United States v.*

William Savran & Assocs., Inc., 755 F. Supp. 1165, 1178 (E.D.N.Y. 1991) (collecting examples).

Section (a)(2) of the Fraud Injunction Act carries the same present-tense emphasis as (a)(1). It states that "the Attorney General may commence a civil action" to enjoin any person who is "alienating or disposing of property, or intends to alienate or dispose of property" that was "obtained as a result of" or "is traceable to" a banking or health care violation. Section 1345(a)(2) thus covers only those people who *presently have* tainted property (i.e., property "traceable to" a violation). And this makes sense: a court cannot logically order a person to keep property they do not have; nor can a court rightfully order a person to stop using legitimate property.

This leads to § 1345(b), which also speaks in the present tense like § 1345(a). It states that where the Attorney General has filed suit under § 1345(a) to stop either fraudulent conduct or the dissipation of tainted property, the court may take any other action "warranted to prevent a continuing and substantial injury to the United States or to any person for whose protection the action is brought." *Id.* This does not grant any new form of power to the court—it merely confirms that a court may use its traditional, limited equitable powers in enforcing §§ 1345(a)(1) and (a)(2). *See Jones*, 652 F. Supp. at 1559-60.

With this context in mind, the plain meaning of §§ 1345(a)(2)(A) and (B) becomes accessible. These provisions delineate two distinct forms of relief that

the Attorney General may choose between in seeking a court order under § 1345(a)(2) to prevent tainted property from being hidden or dissipated. As such, under § 1345(a)(2)(A), where a person "is alienating or disposing of" tainted property—or where a person "intends" to do this—the Attorney General may seek a court order to "enjoin such alienation or disposition of property." In some cases, this may be more than enough. For example, barring a jailed defendant from spending tainted cash in his personal bank account will preserve the status quo value of this cash.

But in cases where a simple injunction will not protect the value of tainted property, § 1345(a)(2)(B) comes into play. Unlike (a)(2)(A), this provision lets the Attorney General obtain a court order that "prohibit[s] any person"—not just the person who happens to possess the tainted property—from "withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value." This provision accordingly entails an important departure from Federal Rule of Civil Procedure 65(d)(2), which in general limits injunctive relief in civil actions to just the named parties and those acting in concert with them. Section (a)(2)(B) also empowers the court to "appoint a temporary receiver to administer such restraining order."

This provision thus enables the government to preserve the status quo value of tainted property in the face of third-party claims to this property. On this score, consider a hypothetical fraud suspect who uses tainted cash to buy a car that he then allows his

innocent son to drive. As long as the son keeps using the car (i.e., depreciating its value), the fact that the father is barred from selling the car will not preserve the car's value. Section (a)(2)(B) avoids this problem by enabling the court to enter an order that prohibits "any person" from "dissipating" the car, thus barring the son from using the car even though the son is not a named defendant in the Attorney General's civil action under § 1345 against the father.

But what if our fraud suspect instead puts his tainted cash into a bank account to pay his innocent mother's hospital bills? Prohibiting "any person" from "dissipating" this account—including both the mother and the hospital—would preserve its value. It would also harm the mother's health, presuming she has no other way to pay her hospital bills. And there lies the importance of the fact that § 1345(a)(2)(B) permits a court to prohibit the use of *either* tainted property "*or* property of equivalent value." Hence, instead of freezing the tainted cash relied upon by the mother, the court may freeze other untainted property of equal value that the suspect holds (e.g., real estate), constructively transferring the "tainted" status of the former cash onto the latter property. And the court may do the same where the value of tainted property is better preserved by freezing untainted property of equal value than by freezing the tainted property itself, which may be subject to depreciation (e.g.,

freezing $100,000 in untainted cash rather than a tainted car valued at $100,000).

The phrase "or property of equivalent value" in § 1345(a)(2)(B) thus does not authorize the freezing of a person's untainted property as a mere substitute for tainted property that cannot be located or that may have already been dissipated. Instead, this phase codifies the far more limited notion that "restraining orders entered before forfeiture should be concerned with preserving assets equivalent in value to the potentially forfeitable property, and not necessarily the precise property." *United States v. Regan*, 858 F.2d 115, 121 (2d Cir. 1988) (interpreting the pre-trial asset freezes authorized under 18 U.S.C. § 1963(d)(1)(A)). And by codifying this notion, this phrase balances the extraordinary injunctive reach of § 1345(a)(2)(B) to "any person" with a quantum of respect for the legal reality that "orders directed at third parties are strong medicine and should not be used where measures that are adequate and less burdensome on the third parties are available." *Regan*, 858 F.2d at 121.[3]

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[3] This reading of § 1345(a)(2)(B) consequently explains why (a)(2)(B) explicitly provides for the appointment of a temporary receiver while (a)(2)(A) does not. A temporary receiver may well be needed to ensure that third-party access to actually tainted property is not abused, and that constructively tainted property is properly managed to preserve its value. *See, e.g., Regan*, 858 F.2d at 121 (affirming court appointment of a monitor to administer pretrial asset freeze affecting third parties).

So, to recap: § 1345(a)(2) lets a court preserve the value of tainted property in one of two ways. The court may freeze *actually tainted property*—i.e., property traceable to a banking or federal health care violation. Or the court may freeze *constructively tainted property*—i.e., untainted property that is equal in value to a person's actually tainted property and then is treated as "tainted" by the court in order to preserve the status quo or to ensure that innocent third parties are still able to use actually tainted property. In practical terms, this means that where a person is accused of perpetrating a $10 million fraud and examination of their property reveals that they hold just a $5 million house traceable to the fraud and $5 million in cash acquired long before the fraud, the court may freeze *either* the tainted house *or* the untainted cash as "property of equivalent value" to the tainted house. But § 1345(a)(2) does not allow *both* the cash and the house to be frozen on the ground that the accused allegedly took $10 million and freezing these two properties would ensure the government a full recovery upon conviction.[4]

Indeed, were the plain terms of § 1345(a)(2) meant to be interpreted in this latter way—as a law enabling the government to impose a pretrial blanket freeze on a person's assets in an amount equal to the

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[4] *See Caldwell v. United States*, 49 U.S. 366, 379-80 (1850) (holding that where a forfeiture-related law gives the government a disjunctive choice between two ways to forfeit property, the government may choose either option).

putative fraud committed by the person—then the law would read this way. It does not. The clearest proof of this can be seen by comparing § 1345(a)(2) to 12 U.S.C. § 1818(i)(4), a banking law that actually does authorize prejudgment attachment. Both sections were enacted under the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Title XXV of the Crime Control Act of 1990, Pub. L. No. 101-647, § 2521, 104 Stat. 4859, 4864-65 (1990). *See United States v. DBB, Inc.*, 180 F.3d 1277, 1284 (11th Cir. 1999) (using § 1818(i)(4) to interpret § 1345(a)(2)).

Unlike § 1345(a)(2), § 1818(i)(4) is explicitly entitled "Prejudgment attachment." *Cf. Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (the "heading of a section" is a tool of statutory construction). The operative language of § 1818(i)(4), in turn, contains none of the terms in § 1345(a)(2) that limit the asset-freezing power of § 1345(a)(2) to actually or constructively tainted property. Section 1818(i)(4) instead provides that incident to a civil or administrative legal proceeding against an insured depository institution, a court may "prohibit[ ] any person subject to the proceeding from withdrawing, transferring, removing, dissipating, or disposing of **any funds, assets or other property**."

Accordingly, given the vast difference between a law like § 1818(i)(4) that reaches "any" property and a law like § 1345(a)(2) that only reaches property "traceable to" fraud, it is no surprise that most courts

have enforced § 1345(a)(2) with a careful eye towards freezing only tainted property.[5] In *United States v. Brown*, for example, the Sixth Circuit reversed a property freeze under § 1345(a)(2) on all funds held by defendants "at any financial institution except for an allowed withdrawal of $10,000 per month for business expenses." 988 F.2d 658, 664 (6th Cir. 1993). The Sixth Circuit emphasized that only assets "related to the alleged fraud" were freezable and thus criticized the district court for failing to "distinguish between the proceeds from the alleged fraud and [defendants'] untainted [business] funds." *Id.*

Here, however, the government, district court, and Eleventh Circuit read § 1345(a)(2) in a way that eliminated any need on their part to identify the amount of tainted property held by the Petitioner, much less distinguish this property from Petitioner's

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[5] *See, e.g., United States v. Cacho-Bonilla*, 206 F. Supp. 2d 204, 209 (D.P.R. 2002) (holding that § 1345 receiver could only administer property traceable to a violation); *United States v. Sriram*, 147 F. Supp. 2d 914, 947 (N.D. Ill. 2001) (finding nothing in the language of § 1345 to show it "embrace[d] assets not only traceable to the violation but also assets sufficient to secure an ultimate money judgment"); *United States v. Fang*, 937 F. Supp. 1186, 1194, 1201 (D. Md. 1996) ("[A]ny assets to be frozen [under § 1345] must in some way be traceable to the allegedly illicit activity."); *United States v. Quadro Corp.*, 916 F. Supp. 613, 618-19 (E.D. Tex. 1996) (denying § 1345 freeze where the government failed to link "any specific assets" to an alleged fraud); *see also United States v. Mercy Reg'l Health Sys., Ltd.*, No. 08-cv-0188, 2008 U.S. Dist. LEXIS 19362, at *10 (S.D. Ill. Mar. 13, 2008) ("[T]he Court will only restrain assets in bank accounts . . . traceable to the violations alleged.").

untainted holdings. Such rewriting of § 1345(a)(2) should not be sustained by this Court.

B. Construing the FIA to reach untainted property rewrites the FIA.

While the Fraud Injunction Act, § 1345(a)(2) has been read by most courts to authorize the freezing of only tainted property (either actual or constructive), the government, district court, and Eleventh Circuit in this case took a different view. The government read § 1345(a)(2) as allowing a court to freeze as much of a person's property as is needed to "ensure that sufficient assets are available to satisfy any judgment requiring restitution or forfeiture." Cert. Pet. 8 (quoting the government). The district court buttressed this view, finding the "equivalent value" language in § 1345(a)(2)(B) meant that "when some of the assets obtained as a result of fraud cannot be located, a person's substitute, untainted assets may be restrained instead." P.App.10. The Eleventh Circuit then essentially rubber-stamped this view by affirming the district court without any substantive analysis of § 1345(a)(2) or how this provision has been construed by most courts. *See* P.App.1-3.

If the government and district court's reading of § 1345(a)(2) is to be taken seriously, however, then it means effectively rewriting this provision using the past tense and rendering key parts of it surplusage. Here is what § 1345(a)(2) looks like as interpreted by the government, the district court, and

the Eleventh Circuit in this case, with the grey bars reflecting the language in § 1345(a)(2) that is rendered surplusage by this interpretation:

> (2) If a person [has] is alienat[ed] or dispos[ed] of property, or intends to alienate or dispose of property, obtained as a result of a banking law violation (as defined in section 3322 (d) of this title) or a Federal health care offense or property which is traceable to such violation, the Attorney General may commence a civil action in any Federal court—
>
> (A) to enjoin such alienation or disposition of property; or
>
> (B) for a restraining order to—
>
> (i) prohibit any person from withdrawing, transferring, removing, dissipating, or disposing of any such property or property of equivalent value; and
>
> (ii) appoint a temporary receiver to administer such restraining order.

Under this view of § 1345(a)(2), the government may freeze a person's assets without ever needing to show that the person holds even a single dollar that is "traceable to" a banking or health care violation. The government need only show that sometime in the past, a person "alienat[ed]" tainted property, thus letting the court freeze the person's untainted property in an amount "equivalent" to the alienated tainted property. This places § 1345(a)(2) in stark tension

with every other part of § 1345 (which are all focused on *present*, not past, conduct), makes the simple injunction under § 1345(a)(2)(A) irrelevant (as this injunction only serves to restrict a person from alienating tainted property they *now* have), and detaches the "property of equivalent value" language in § 1345(a)(2)(B) from the words immediately before it ("any such property or") that most naturally serve to answer the question "equivalent to what?"

Such an interpretation of § 1345(a)(2) thus flies in the face of this Court's precedents, which express "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990). Indeed, the very goal of statutory interpretation is to "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Finally, "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."[6] *Botany Worsted Mills v. United States*, 278 U.S. 282, 288 (1929).

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[6] This principle is of particular relevance in dealing with forfeiture-related statutes, because "the legislature may provide that its forfeitures shall take effect differently from the course prescribed by the common law." *United States v. 1960 Bags of Coffee*, 12 U.S. 398, 408 (1814) (Story, J., concurring).

Yet, the reading of § 1345(a)(2) advanced here by the government, the district court, and the Eleventh Circuit does not follow any of these principles. This reading instead elides those words in § 1345(a)(2) that limit when property may be frozen and what kinds of property may be frozen, thereby granting the government an unprecedented amount of "leverage" to "exert against a potential criminal fraud defendant." *Fang*, 937 F. Supp. at 1202. Such an outcome, in turn, squarely conflicts with this Court's decision last term in *Yates v. United States*.

In *Yates*, this Court rejected "the Government's unrestrained reading" of 18 U.S.C. § 1519, which penalizes the destruction of records, documents, and tangible objects relevant to a federal investigation—a law the government argued could be read to reach the disposal of illegally-caught fish. 135 S. Ct. 1074, 1078-79, 1081 (2015) (plurality op.). The Court noted that while it might be "advisable" for Congress to enact "a coverall spoliation of evidence statute," the Court could not morph § 1519 into such a broad statute absent "clear and definite" language in § 1519 supporting this view. *Id.* at 1088-89.

Yates thus stands for the simple proposition that a law should not be read to give extraordinary power to the government, however "advisable" this power might be, absent clear language in the law to support this reading. But here, the government, the district court, and the Eleventh Circuit all read § 1345(a)(2) to operate as a prejudgment attachment on *all* of a criminal defendant's property (tainted or not)—an

extraordinary remedy[7]—not by pointing to clear and definite language in § 1345(a)(2) supporting this conclusion (e.g., a putative section heading like "prejudgment attachment"), but rather by *ignoring* the clear and definite language in the law supporting the exact opposite conclusion (e.g., use of the present-tense and the "traceable to" requirement).

As such, the Court should reject this reading of § 1345(a)(2) with the same vigor it rejected the government's overreaching in *Yates*. The better reading of § 1345(a)(2) belongs to Amicus, because only Amicus reads this provision in a way that gives meaning to every word in this provision while harmonizing this provision with every other part of the Fraud Injunction Act. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must interpret [a] statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into a[ ] harmonious whole." (internal citations and quotation marks omitted)).

C. Under a plain reading of the FIA, the district court's freeze of Luis's assets lacked statutory authorization.

Once the Fraud Injunction Act, § 1345(a)(2) is read in plain terms—as set forth in Part I.A above—it becomes clear that the $45 million property freeze

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[7] *See infra* Part IV; *Sriram*, 147 F. Supp. 2d at 947-48.

that the district court entered against Petitioner here lacked proper statutory authorization. *See* P.App.4-34. This is true in two main respects:

First, in order to freeze Petitioner's property under § 1345(a)(2), the district court had to find that Petitioner "is alienating or disposing" or "intends to alienate or dispose" of property obtained from or traceable to a banking law violation or health care offense. The district court did not find this. What the district court held was that Petitioner "**has** alienated or disposed of property, and unless enjoined **could continue to alienate or dispose of property**" from a health care violation. P.App.5 (emphasis added). The district court thus froze almost all of Petitioner's property based on a combination of past conduct and speculative reasoning about Petitioner's future conduct—not on what Petitioner was *actually doing* or *intended to do*. By contrast, in *United States v. Gupta*, a district court froze a defendant's assets under § 1345(a)(2) after finding that the defendant "**is now** dissipating assets traceable to his fraud." No. 11-3329, 2011 U.S. Dist. LEXIS 97264, at *11 (C.D. Ill. Aug. 30, 2011) (emphasis added).

Second, to freeze Petitioner's property under § 1345(a)(2), the district court had to identify the property held by Petitioner that was "obtained from" or "traceable to" Petitioner's alleged health care offense. This is because under § 1345(a)(2)(A) and (B), the only property that the Petitioner can be enjoined

from dissipating is either tainted property now in her possession[8] or untainted property equal in value to the tainted property now in her possession. But the district court made no effort to analyze Petitioner's current holdings.[9] Instead, the district court looked to the fact that Petitioner's alleged health care offenses "resulted in $45 million of improper Medicare benefits being paid" to Petitioner, and then imposed a blanket $45 million freeze on all property belonging to Petitioner—even though it was undisputed that Petitioner "has much less than $45 million in personal assets." P.App.6,12.

But even if Petitioner did obtain $45 million through the offenses she is accused of, § 1345(a)(2) still requires the court to determine how much of this $45 million is *presently* in the Petitioner's *possession*. As such, the only way the district court could freeze all of Petitioner's property (as it effectively did here) is by finding that all of Petitioner's property could be traced to the tainted $45 million. *Cf. United States v. Barnes*, 912 F. Supp. 1187, 1198 (N.D. Iowa 1996) (freezing under § 1345(a)(2) all bank accounts held by

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[8] By "possession," Amicus means *all* forms of possession, actual and constructive. *See Henderson v. United States*, 135 S. Ct. 1780, 1784 (2015).

[9] Had the district court performed this analysis, it could have readily identified property in Petitioner's possession that was tainted and thus freezable under § 1345(a)(2)—a reality made clear by the court's acknowledgement of the government's "evidence that [Petitioner] used . . [tainted] funds to purchase luxury items, real estate, [and] automobiles." P.App.13-14.

defendants because all the cash in these accounts was traceable to defendants' alleged fraud).

The district court did not make such a finding here—nor could it given Petitioner's showing that at least $15 million of her property came from untainted sources. Cert. Pet. 12. The district court's broad $45 million freeze could, of course, be read as treating this untainted $15 million as "property of equivalent value" to Petitioner's tainted holdings. But the district court never found that Petitioner held $15 million in tainted property. Plus, even if the district court had made this finding, the court then could freeze *either* Petitioner's actually tainted $15 million *or* her untainted $15 million (which, once frozen, would be constructively tainted). Not both.

The district court's imposition of a pretrial blanket $45 million freeze on Petitioner's property therefore cannot be reconciled with the plain requirements of § 1345(a)(2). And while the district court may well have viewed this freeze as consistent with the idea that the government should be able to recover in full even when "some of the assets that were obtained as a result of fraud cannot be located," that is not what § 1345(a)(2) is meant to do. P.App.10. Indeed, this provision has a much narrower purpose: to prevent fraud suspects from concealing or dissipating the tainted property they actually possess.

II. Construing the FIA to reach only tainted property accords with the FIA's historical purpose: to prevent the concealment and dissipation of tainted property.

Congress enacted the Fraud Injunction Act, 18 U.S.C. § 1345, as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1205(a), 98 Stat. 1837, 2152 (1984). At that time, the Act did not explicitly authorize property freezes—it just allowed courts to enjoin imminent and ongoing fraudulent conduct. *See Jones*, 652 F. Supp. at 1559. It was only through the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 that § 1345 was finally amended to empower courts to freeze property. *See DBB, Inc.*, 180 F.3d at 1282. The Sixth Circuit effectively traces the course of this evolution in *United States v. Brown*, 988 F.2d at 660-61. *See also Fang*, 937 F. Supp. at 1192-94.

Ultimately, the main point to be taken from the historical genesis of the Fraud Injunction Act, both before and after Congress amended it to authorize property freezes, is that the Act's core purpose has always been *to prevent imminent or ongoing harm*—not penalize or remediate such harm after the fact. As Congress took care to observe in explaining why it was necessary to adopt the Act in the first place: "Experience has shown that even after indictment or the obtaining of a conviction, the perpetrators of fraudulent schemes continue to victimize the public. [T]he Attorney General should be empowered to bring suit to enjoin the fraudulent acts or

practices." S. Rep. No. 98-225, at 402 (1983). And the original text of § 1345—now present at § 1345(b)—bears out this understanding, empowering courts to enjoin fraud violations only so far "as is warranted **to prevent** a continuing and substantial injury to the United States."

That purpose did not change in 1990, when Congress amended the Fraud Injunction Act to give courts the power to freeze property traceable to fraudulent conduct. Indeed, as the Sixth Circuit notes: "By amending section 1345, Congress wanted to respond to the savings and loan scandal because 'executives of thrift institutions and other[s] associated with them enriched themselves by fraudulently diverting immense amounts of funds from those institutions.'" *Brown*, 988 F.2d at 662 (quoting H.R. Rep. No. 101-681(I)). Accordingly, to ensure these tainted funds were not concealed or dissipated before the government could recover them, Congress gave courts the power under § 1345(a)(2) to freeze these funds, "enhanc[ing] the United States' ability **to prevent** the wrongful disposition of assets after violations have occurred." *Id.* (emphasis added).

Even the government has acknowledged this to be the purpose of § 1345(a)(2), as may be seen in a 1997 bulletin published by the Executive Office for U.S. Attorneys which clarifies that the government "may feasibly seek an injunction [under § 1345(a)(2)] long after the underlying bank fraud or health care fraud has stopped if one can prove *imminent*

alienation or disposal of the proceeds of the fraud."[10] Indeed, § 1345(a)(2) enables a court to freeze a person's property *to prevent them* from hiding or spending tainted money. But once a person has spent this money (or if the money cannot be located), then any freeze on a person's property serves a totally different purpose: to remediate harm after the fact by guaranteeing a person's capacity for restitution. That *punitive*—as opposed to *preventative*—purpose[11] cannot be found in the historical genesis of § 1345, and thus furnishes additional grounds for the Court to favor Amicus's prevention-driven interpretation of § 1345(a)(2) over one that treats this law as a broad authorization of prejudgment attachment.

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[10] *See* Michael Runyon (Asst. U.S. Att'y, M.D. Fla.) & David Jennings (Asst. U.S. Att'y, W.D. Wash.), *Practicing in the Field of Injunctions*, 45 USABULLETIN, no. 2, April 1997, *available online* http://www.justice.gov/sites/default/files/usao/legacy/2007/01/11/usab4502.pdf (at PDF p.41) (emphasis added).

[11] *See United States v. Logal*, 106 F.3d 1547, 1551-52 (11th Cir. 1997) ("'[T]hough restitution resembles a judgment for the benefit of a victim, it is penal . . . .'"); *see also Johnson v. United States*, 135 S. Ct. 2551, 2566 n.1 (2015) (Thomas, J., concurring) ("[A] law imposing a monetary exaction as a punishment for noncompliance with a regulatory mandate is penal.").

III. Construing the FIA to reach only tainted property accords with the exclusive power of the Health and Human Services Secretary to exact monetary penalties and restrain assets in Medicare fraud cases.

The district court froze Petitioner's property in this case based on government evidence that Petitioner had committed several federal health care offenses, including billing fraud and paying kickbacks. *See* P.App.12-14. It should not be assumed, however, that the Fraud Injunction Act, 18 U.S.C. § 1345(a)(2), was the only law that the government could rely on to offset Petitioner's alleged $45 million fraud. *See id.* In fact, the government could have relied on 42 U.S.C. § 1320a-7a(k), which, unlike § 1345(a)(2), is a prejudgment attachment statute meant to be used in health care fraud cases. The existence of this law, in turn, only further affirms why § 1345(a)(2) cannot be read as a prejudgment attachment statute.

Under 42 U.S.C. § 1320a-7a(k), whenever the Secretary of the U.S. Department of Health and Human Services ("HHS") "has reason to believe that any person has engaged, is engaging, or is about to engage in any activity which makes the person subject to a civil monetary penalty" under § 1320a-7a—which includes both billing fraud and illegal kickbacks[12]—"the Secretary may bring an action in an

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[12] *See* 42 U.S.C. §§ 1320a-7a(a)(1) (civil monetary penalty for Medicare fraud); 1320a-7a(a)(7) (civil monetary penalty for kickbacks, as prohibited by 42 U.S.C. § 1320a-7b(b)).

appropriate district court to enjoin the person from concealing, removing, encumbering, or disposing of assets which may be required in order to pay a civil monetary penalty." And the monetary penalties established under § 1320a-7a for various federal health care offenses are substantial (e.g., a $50,000 penalty for every illegal kickback plus up to three times the value of all such kickbacks).[13]

The plain language of § 1320a-7a(k) thus enables the government to do what the plain language of § 1345(a)(2) does not: rely upon solely past conduct to freeze a person's untainted property in anticipation of restitution. But why, then, did the government not use § 1320a-7a(k) in this case? Perhaps because only the HHS Secretary can invoke § 1320a-7a(k)—not the Attorney General. And that is the whole point. Indeed, § 1320a-7a(k) serves to reflect the important reality that "Congress has actively developed a comprehensive bifurcated civil and criminal scheme for addressing fraudulent and abusive payment practices in federal health care programs." *Reliable Ambulance Serv. v. Mercy Hosp. of Laredo*, No. 4-02-0188-CV, 2003 WL 21972724, at *6 (Tex. App. Aug. 20, 2003) (detailing how this scheme works).

This bifurcated scheme means that while the Attorney General may prosecute kickback and billing

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[13] *See* 42 U.S.C. § 1320a-7a(a).

violations as crimes,[14] only HHS may exact monetary penalties and freeze health care provider assets for these same offenses. And for good reason:

First, HHS's exclusive monetary-exaction power goes hand-in-hand with HHS's exclusive ability (albeit after consulting with the Attorney General) to eliminate kickback offenses entirely by creating "safe harbors" that exempt persons from prosecution. *See Reliable*, 2003 WL 21972724, at *4; *see also* 42 C.F.R. § 1001.952 (setting out 25 safe harbors). HHS can even forgive conduct that facially violates the anti-kickback law and does not fall within a safe harbor so long as the HHS Office of the Inspector General deems the conduct to "pose[ ] little risk of fraud and abuse." *Reliable*, 2003 WL 21972724, at *5 (citing HHS OIG Advisory Op. 01-18 (Nov. 7, 2001)).

Second, HHS's exclusive monetary-exaction power goes hand-in-hand with HHS's statutory duties both to afford due process to those it targets with this power (*see* 42 U.S.C. § 1320a-7a(c)(2)) and to use all money collected from violators to reimburse defrauded health care programs (*see id.* § 1320a-7a(f)(3)). By contrast, all money collected by the Attorney General through criminal forfeiture—even if based on a federal health care offense that caused a financial

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[14] Federal law limits the nature of such prosecution. Under 42 U.S.C. § 1320a-7b(a) & (b), both fraudulent Medicare billing and illegal kickbacks are criminally punishable by only a fine of up to $25,000 and a prison term of up to five years.

loss to Medicare—goes into the Attorney General's coffers. *See* 28 U.S.C. § 524(c)(4)(A) ("all amounts from the forfeiture of property under any law enforced" by the Attorney General "shall be deposited" in the U.S. Department of Justice's Assets Forfeiture Fund, with certain exceptions that are not relevant here).

Third, and finally, HHS's exclusive monetary-exaction power goes hand-in-hand with HHS's unique expertise and institutional responsibility. Simply put, freezing a health care provider's funds carries the grave risk of shuttering vital medical services, even where a provider may have engaged in some amount of fraud. *See, e.g.*, *Mercy Reg'l Health*, 2008 U.S. Dist. LEXIS 19362, at *6 (rejecting the Attorney General's "extraordinary request" under § 1345 "to shut down" what was "the largest ambulance service in the area" around Benton, Ill.). Being responsible for the entire federal health care system, HHS retains the experience and objectivity needed to appreciate this risk, while the Attorney General, driven by the "often competitive enterprise of ferreting out crime," does not. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Only HHS may thus impose broad asset freezes on health care providers. And where Congress has made "a basic decision on how to allocate responsibility among different federal agencies," this decision must be respected. *Am. Bankers Ass'n v. SEC*, 804 F.2d 739, 755 (D.C. Cir. 1986). Hence, to stretch the Fraud Injunction Act, § 1345(a)(2) to grant power to the Attorney General that Congress wanted only HHS to have—as the government, the district court,

and the Eleventh Circuit effectively did here—is tantamount to a "unilateral[ ] changing [of] the rules of the game." *Id.* Such interpretive gymnastics should not be sustained by this Court regardless of whatever "beneficial purpose or regulatory need" could be offered to justify them. *Id.*

IV. Construing the FIA to reach only tainted property accords with the traditional reach of federal equity practice, which does not include prejudgment asset freezes.

The Fraud Injunction Act explicitly provides that all proceedings under the Act, including ones to freeze property, are "governed by the Federal Rules of Civil Procedure." 18 U.S.C. § 1345(b). This places the Act within the ambit of federal equity practice—a tradition in which prejudgment attachment is "a type of relief that has never been available before." *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). This tradition, in turn, furnishes another key reason why the Act's property-freezing power must be read in a far more restrained manner than was employed by the government, the district court, and the Eleventh Circuit here.

Congress may, of course, enable federal courts to grant forms of equitable relief beyond what has been traditionally available at common law. As this Court has explained, "[w]hen there are indeed new conditions that might call for a wrenching departure from past practice, Congress is in a much better position

to perceive them and to design the appropriate remedy." *Grupo*, 527 U.S. at 322. At the same time, any such remedy must be read with care. This follows from the longstanding judicial canon that statutes in derogation of common law are to be strictly construed—or, put more precisely, "statutes will not be interpreted as changing the common law unless they effect the change with clarity."[15]

Hence, in *United States v. Sriram*, a federal district court rejected the government's argument that § 1345(a)(2) should be interpreted as allowing the court to freeze not only tainted property but also "a sum that accounts for trebled damages and civil penalties." 147 F. Supp. 2d 914, 947 (N.D. Ill. 2001). The court first highlighted the plain language of § 1345(a)(2), finding the statute meant "just what it says: that an injunction is authorized to put a hold on the fruits of the criminally fraudulent activity." *Id.* The court then noted there was "nothing in the language" of § 1345(a)(2) to support the government's view that § 1345(a)(2) further authorized a freeze on "assets sufficient to secure an ultimate money judgment." *Id.* And this led the court to emphasize the need for "caution in expanding the sweep of that authority to freeze assets beyond the specific grant of authority made by Congress," as this power was "not generally available" at common law. *Id.* at 948.

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[15] ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012).

The district court and Eleventh Circuit should have performed the same analysis here. Had they done so, caution would have militated against accepting the government's view that § 1345(a)(2) authorized all of Petitioner's property to be frozen to secure "any judgment requiring restitution or forfeiture." Cert. Pet. 8. That such caution was absent in these courts' respective decisions, in turn, confirms their hasty "creat[ion] [of] a precedent of sweeping effect" without proper regard for the plain language of § 1345(a)(2) or the narrower manner in which this language could have been read (*see* Part I.A). *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 222 (1945). The Court should not allow that error to stand.

V. Construing the FIA to reach only tainted property accords with the rule that forfeitures are not favored in law.

The Fraud Injunction Act, 18 U.S.C. § 1345(a)(2) is not only a statute in derogation of common law but also one that forfeits property.[16] This demands even more caution in how courts enforce the Act, because "[f]orfeitures are not favored" in the law and should be enforced "only when within both letter and spirit of the law." *One 1936 Model Ford*, 307 U.S. at 226. Yet, here, the government, the district court, and the

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[16] While the Act merely freezes property *pendente lite*—rather than seizing it permanently—the Act still works a forfeiture. *Cf. Krimstock v. Kelly*, 306 F.3d 40, 43-44 (2d Cir. 2002).

Eleventh Circuit took the exact opposite approach, reading § 1345(a)(2) in a way that enabled this law to freeze all of Petitioner's property, tainted or not.

It remains the case, however, that when "two constructions can be given to a statute, and one of them involves a forfeiture, [then] the other is to be preferred." *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875). On this score, the view of § 1345(a)(2) advanced by the government, the district court, and the Eleventh Circuit in this case involves the blanket forfeiture of untainted property. The view of § 1345(a)(2) advanced by Amicus—and supported by most courts—does not. And that fact alone should be reason enough for this Court to favor Amicus's interpretation of § 1345(a)(2).

CONCLUSION

This Court has already concluded that a pretrial freeze of a criminal defendant's tainted property does not raise any constitutional concerns. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989). And that is all the Fraud Injunction Act, 18 U.S.C. § 1345, authorizes. *See* Part I.A. The lower courts in this case failed to realize this, however, and imposed a blanket freeze on Petitioner's untainted assets based on a reading of the Act unsupported by its plain text, historical purpose, schematic role, and common law nature. Accordingly, consistent with the "cardinal principle that this Court will first ascertain

whether a construction of [a] statute is fairly possible by which [a] [constitutional] question may be avoided," the Court should adopt the reading of the Act advanced by Amicus in this brief so as to avoid the constitutional questions presented by this case. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

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IN THE

Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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INTEREST OF *AMICI CURIAE*[1]

Amici are practicing criminal defense lawyers from across the nation. The National Association of Criminal Defense Lawyers is a nonprofit, voluntary, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of 10,000 and an affiliate membership of almost 40,000, including private criminal defense lawyers, military defense counsel, public defenders, law professors, and judges. The Florida Association of Criminal Defense Lawyers ("FACDL") is a statewide organization of criminal defense lawyers with twenty-eight chapters, including its Miami chapter founded in 1963. California Attorneys for Criminal Justice ("CAJC") is a nonprofit statewide organization of criminal defense lawyers founded in 1972, with members across the state of California. The two statewide organizations are among the largest in the nation, and they have a combined membership of over 3,000 attorneys. The members of these organizations are committed to preserving fairness in the state and federal criminal justice systems and defending the rights of individuals guaranteed by the Constitution of the United States.

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[1] The parties have consented to the filing of this brief, and their written consents are on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief.

Amici are concerned that the decisions of the courts below in this case, if left standing, undermine the constitutional right provided those accused of crimes to be represented in criminal proceedings by their counsel of choice. In light of the Government's increasingly broad use of statutes permitting the restraint and forfeiture of assets unrelated to alleged criminal conduct, clients of *amici's* members are often confronted with the issues raised in this case. The organizations therefore have a particular interest in urging this Court to reverse the ruling by the Court of Appeals.

Amici have appeared in this Court as *amicus curiae* on several occasions, including in *Kaley v. United States* (No. 12-464), in which they argued that the Government's asset forfeiture practices undermine the Fifth and Sixth Amendment rights of persons charged with crimes, including the critically important right to counsel of choice. *Amici* offer their collective professional experience and expertise in the present case to illustrate how the Government's use of asset restraint and forfeiture imperils constitutional rights that are fundamental to the fairness and integrity of our nation's criminal justice system.

SUMMARY OF ARGUMENT

More than two decades ago, this Court ruled that the Sixth Amendment does not shield from restraint and forfeiture assets a criminal defendant has obtained as the result of criminal conduct, even when they are needed to retain counsel. In so holding, the Court concluded that the Government's "strong" interest in a complete forfeiture of such

assets trumped any interest a defendant might have in using her alleged "ill-gotten gains" to fund her criminal defense. In light of these pressing imperatives, the Court held, a defendant can be prevented by the Government from paying for counsel with what might potentially be determined (at the end of the criminal process) to be "someone else's money."

A similar ruling is unwarranted here. As the parties stipulated below, the restraint imposed in this case reaches an "unquantified" amount of assets unconnected to the alleged violations of law—i.e., it reaches "untainted" assets. The distinction between tainted and untainted assets is both statutorily and constitutionally crucial. The comprehensive statutory regime Congress created to govern criminal forfeiture—bypassed by the Government here—meaningfully and deliberately distinguishes between tainted and untainted assets. Only the former are subject to pretrial restraint. The Government's attempt to use a civil injunction statute to restrain for eventual forfeiture assets that forfeiture law does not permit to be restrained circumvents important congressional limits on the Government's already extraordinary powers.

More importantly, the Government's end run around the limits Congress has imposed on criminal forfeiture also fails to comport with the Constitution. This Court has long recognized that the Sixth Amendment guarantees not only that a criminal defendant has the right to counsel, but also that, unless indigent, the accused has the right to retain counsel *of choice*. This constitutional right is fundamental, and its improper deprivation

compromises both the individual guarantee of a fair criminal proceeding and the integrity of the criminal justice system more broadly.

This Court's decisions in *Caplin* and *Monsanto* do not hold otherwise. Both were predicated on a notion that has no application here: that the Government's claim to alleged tainted assets is superior to any claim the accused might have, and a criminal defendant therefore can be prevented from expending such assets, even if they are needed to pay for a lawyer. Whatever its merit, this doctrine does not vest the Government with a superior claim to *untainted* assets. As this Court has repeatedly held, if the Sixth Amendment right to counsel of choice means anything, it means that a criminal defendant can spend her own money to retain the attorney she thinks will best represent her.

The Government's supposed interest in restraining and eventually forfeiting a criminal defendant's untainted assets does not justify dispensing with that right. In *Caplin*, the Court identified three primary interests served by asset forfeiture that would be frustrated if tainted assets were paid over to a defense lawyer: (1) funding law enforcement; (2) providing restitution to victims; and (3) combatting the economic power of organized crime and drug-trafficking enterprises. With the benefit of more than twenty-five years' experience with forfeiture practices since *Caplin* and *Monsanto*, none of these reasons justify pretrial seizure of untainted assets and the corresponding Sixth Amendment violation at issue here. The experience of the last two decades demonstrates how funding law enforcement through forfeiture creates perverse

and dangerous governmental incentives at the local, state, and federal level. And while providing restitution to victims may be a laudable goal, it does not justifying displacing a criminal defendant's fundamental rights.

As this case demonstrates, the Government also does not need to deprive a criminal defendant of legitimate assets needed to retain counsel of choice in order to fight crime effectively. In this and other financial crime cases, the Government's forfeiture authority is already potent; granting it the additional power it seeks here will only stack the deck further in its favor. If the Sixth Amendment right to counsel of choice is to be more than a dead letter, at minimum it requires that a defendant be allowed to use untainted assets to fund her defense. The Court should reverse the decision below.

ARGUMENT

I. The Government's Attempt To Restrain Untainted Assets Circumvents An Essential Limit On The Forfeiture Power.

In affirming the district court's refusal to allow Petitioner to pay for counsel of choice out of untainted assets, the courts below relied on this Court's decisions in *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) and *United States v. Monsanto*, 491 U.S. 600 (1989). *See* Pet. App. 3; *id.* at 30-32. In those cases, however, there was no question that the assets subject to restraint or forfeiture bore the requisite statutory nexus to the criminal conduct in question. *See Caplin*, 491 U.S. at 619-20; *Monsanto*, 491 U.S. at 602-04. This Court

has therefore never confronted the key question presented in this case: Whether the pretrial restraint of *untainted* assets violates the Sixth Amendment when it impairs the accused's right to retain counsel of choice.

That distinction is crucial. Under the statutory scheme governing criminal forfeiture, the Government can secure pretrial restraint of assets that are connected to the asserted crime—i.e., "tainted" assets. Given the broad terms in which many statutes define these "ill-gotten gains" and the authority the Government has to restrain such assets prior to trial, this power reaches far and wide. What the Government cannot do in criminal forfeiture, however, is precisely what it seeks to do here via a civil proceeding under 18 U.S.C. § 1345—impose similar restraints on *untainted* assets. Congress never intended § 1345 to be used as an expansion of criminal forfeiture law, and the statute should not be read to permit the Government to evade the well-considered limitations Congress has imposed on the forfeiture power.

A. The Government already enjoys considerable authority to seize and forfeit assets held by a criminal defendant.

The Government's power to restrain and forfeit a criminal defendant's assets is exceptionally broad. The statutory regime delineating the Government's criminal forfeiture authority defines what are considered to be forfeitable "tainted" assets in broad terms. The Government can seek to forfeit criminal proceeds obtained "directly or indirectly" from

offense conduct, 21 U.S.C. § 853(a)(1), as well as property obtained "as the result of" a criminal violation, *id.*, and property used to facilitate or commit an offense, *id.* § 853(a)(2).[2] The statutes governing money-laundering offenses similarly authorize the forfeiture of any property "involved in" a money laundering transaction. 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1); *see also* 31 U.S.C. § 5317(c)(1)(A) (mandating forfeiture of all property "involved in" currency-structuring offenses). In a number of instances Congress has also defined the term "proceeds" to permit the pretrial restraint and forfeiture of the gross proceeds of offense conduct. 18 U.S.C. § 981(a)(2)(A) (specifying that the "proceeds" forfeitable to the Government are "not limited to the net gain or profit realized" from the covered offenses); *id.* § 982(a)(7) (covering gross proceeds "traceable" to certain offenses); *see also* 18 U.S.C. § 1963(a)(2)(D) (deeming forfeitable property "affording a source of influence" over a criminal enterprise).

Formulations that allow for the forfeiture of "gross proceeds" or all property "involved in" offense conduct have been construed by lower courts to extend the Government's forfeiture power to assets

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[2] Section 853 provides the procedural framework for most criminal forfeitures; 18 U.S.C. § 982 incorporates the framework by reference. 18 U.S.C. § 982(b)(1). The Racketeer Influenced and Corrupt Organizations Act (RICO) includes its own procedural framework, 18 U.S.C. § 1963, which is nearly identical to that found in § 853. *See United States v. McHan*, 101 F.3d 1027, 1042 (4th Cir. 1996) (noting that courts "generally construe the drug and RICO forfeiture statutes similarly").

far beyond any sums a defendant might have netted from the alleged offense. *See, e.g.*, *United States v. Davis*, 706 F.3d 1081, 1082-84 (9th Cir. 2013) (upholding money laundering forfeiture award for $1.3 million in laundered funds against a defendant who received only $73,782 in commissions for his involvement); *United States v. Puche*, 350 F.3d 1137, 1153-54 (11th Cir. 2003) (upholding forfeiture order of $1.6 million of defendants' assets because it included $22,375.00 in illegally derived funds); *United States v. Bollin*, 264 F.3d 391, 417-19 (4th Cir. 2001) (upholding $1.2 million forfeiture judgment against attorney who received only $30,000 in fees for minor role in securities fraud); *see also United States v. Schlesinger*, 396 F. Supp. 2d 267, 271-72 (E.D.N.Y. 2005), *aff'd*, 514 F.3d 277 (2d Cir. 2008) (citing additional cases).

But criminal forfeiture reaches more broadly still; under § 853 the Government is not limited to seizing assets with a nexus to the offense conduct, but can also forfeit "substitute property" when tainted assets are unavailable. *See* 21 U.S.C. § 853(p). These assets are subject to seizure and forfeiture, but only after the Government convicts the defendant of offense conduct and makes the requisite showing that, as a result of the act or omission of the defendant, directly forfeitable property cannot be located or is unavailable. *See, e.g.*, *United States v. Voigt*, 89 F.3d 1050, 1086 (3d Cir. 1996) ("The substitute asset provision comes into play only when forfeitable property cannot be identified as directly 'involved in' or 'traceable to' money laundering activity."). If the Government makes this post-conviction showing, then a court must order the forfeiture of the defendant's

"substitute property," up to the value of any directly forfeitable property that is unavailable. *See* 21 U.S.C. § 853(p)(2). In short, the Government has significant tools at its disposal to prevent those accused of crime from enjoying the fruits of their illicit labors.

B. The distinction between tainted and untainted assets imposes an important limitation on the restraint and forfeiture power.

If the statutory scheme governing criminal forfeiture allows the Government to reach deeply into a defendant's pockets, it also contains an important limitation: With few exceptions, property is subject to *pretrial* restraint or seizure only when it bears a direct nexus to the underlying alleged offense. Under § 853(e), if there is a substantial probability that property the Government targets will be rendered unavailable for forfeiture upon conviction, the Government can seek a restraining order or injunction to preserve those assets. 21 U.S.C. § 853(e).

Crucially, however, "substitute property" as defined in § 853(p)—i.e., "untainted" assets with no connection to the offense conduct—is *not* subject to pretrial restraint. The statutory text makes this clear. The Government may only seek to restrain for later criminal forfeiture property of the kind described in subsection (a) of the statute. 21 U.S.C. § 853(p)(1). That subsection, in turn, refers *only* to directly forfeitable property, i.e., property that bears the requisite nexus to the offense conduct. 21 U.S.C. § 853(a). Simply put, criminal forfeiture law

generally protects from pretrial restraint property that lacks any connect to the crime alleged.

The Courts of Appeals agree. In light of the express textual limitation on the type of assets that are subject to pretrial restraint, all but one of the federal circuits to have considered the statute's scope have concluded that "the plain language of § 853(e) conveys Congress's intent to authorize the restraint of tainted assets prior to trial, *but not the restraint of substitute assets*." *United States v. Parrett*, 530 F.3d 422, 431 (6th Cir. 2008) (emphasis added); *see also United States v. Field*, 62 F.3d 246, 248-49 (8th Cir. 1995); *United States v. Ripinsky*, 20 F.3d 359, 363 (9th Cir. 1994); *United States v. Floyd*, 992 F.2d 498, 500-02 (5th Cir. 1993); *United States v. Gotti*, 155 F.3d 144, 149 (2d Cir. 1998) (similar restraint provision in the Racketeer Influenced and Corrupt Organizations (RICO) statute "does not authorize the pretrial restraint of substitute assets"); *In re Assets of Martin*, 1 F.3d 1351, 1355-56 (3d Cir. 1993) (same).[3]

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[3] The Fourth Circuit stands alone in holding that the RICO statute allow pretrial restraint of substitute assets. *See In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990). As other circuits have recognized, that decision cannot be reconciled with the relevant statutory text. *See, e.g., In re Assets of Martin*, 1 F.3d at 1358-59; *Gotti*, 155 F.3d at 149. The Fourth Circuit's infringement of a criminal defendants' right to counsel of choice produces absurd results. *See, e.g., United States v. Wingerter*, 369 F. Supp. 2d 799, 804 (E.D. Va. 2005) (preventing defendant from using inheritance from great aunt to pay for a lawyer).

The near-unanimity with which the Courts of Appeals have interpreted § 853 and its statutory analogues accords with legislative history. Prior to 1984, the Government could only seize assets associated with an underlying crime, and even then only after indictment. *See Ripinsky*, 20 F.3d at 364. To prevent defendants from avoiding forfeiture by transferring or concealing their assets in advance of conviction, Congress amended § 853(e) to allow the Government to restrain tainted assets prior to indictment. *See id.* (citing S. Rep. No. 98-225, at 202 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3385). But as the Ninth Circuit has explained, "[n]othing Congress did [in § 853] ... suggests ... the substitute asset provision and the temporary restraining order provision should be read in conjunction to provide the government with an even greater governmental power: the pre-indictment restraint of substitute assets." *Id.* at 364-65.[4]

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[4] Several courts have similarly rejected governmental attempts to use state lis pendens laws to prevent the alienation prior to trial of real property with no connection to the alleged offense conduct. *See, e.g., United States v. Jarvis*, 499 F.3d 1196, 1203-05 (10th Cir. 2007); *United States v. Boyer*, 58 F. Supp. 3d 173, 176 (D. Mass. 2014); *United States v. Coffman*, No. 09-cr-181-KKC, 2010 WL 3984886, at *3 (E.D. Ky. Oct. 7, 2010); *cf. also United States v. Monsanto*, 924 F.2d 1186, 1193 (2d Cir. 1991) (recording of lis pendens serves the same purpose as a restraining order under § 853(e)), *abrogated on other grounds by Kaley v. United States*, 134 S. Ct. 1090 (2014).

C. The Government's use of 18 U.S.C. § 1345 in this case is contrary to the statutory scheme governing criminal forfeiture.

In this case, the Government deliberately sought to avoid the constraints that typically limit its pretrial seizure power. At the outset of its criminal case against Petitioner, the Government faced a conundrum. At the same time that it secured an indictment against her, it wanted to seize her assets for eventual forfeiture or restitution. *See* Proposed Order Granting Preliminary Injunction at 1, *United States v. Luis*, 966 F. Supp. 2d 1321 (S.D. Fla. 2013) (No. 12-cv-23588-PCH), ECF No. 99-1. But an unquantified amount of those assets bore no nexus to the offense conduct, i.e., they were untainted. J.A. 161. And neither the criminal forfeiture nor victim restitution laws permit pretrial restraint of untainted assets.[5]

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[5] Congress did not pass legislation proposed by the Justice Department that would have authorized the pretrial restraint of assets for eventual restitution. *See* Restitution for Victims of Crime Act of 2007, S. 973, 110th Cong. § 102 (introduced Mar. 22, 2007). At the time, the current Chief of the Department of Justice Criminal Division's Fraud Section testified that the restraint proposal was "contrary to the long tradition and jurisprudence of pre-conviction asset restraint and forfeiture." *Legislative Proposals to Amend Federal Restitution Laws: Hearing on S. Res. 973 and H.R. 4110 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 47 (2008) (statement of Andrew Weissman).

Faced with these barriers, the Government pursued a dangerous work-around: a separate civil action under 18 U.S.C. § 1345 to restrain both property Petitioner allegedly obtained from criminal conduct and her legitimate assets. Section 1345 is a seldom-used anti-fraud statute that authorizes the Government to civilly restrain any property "obtained as a result of ... a Federal health care offense" or "property of equivalent value"—i.e., untainted assets. *Id.* § 1345(a)(2).[6] In other words, the Government expressly sought to do via § 1345 what it freely acknowledged the text of § 853 forbids—restrain untainted property prior to trial in order to keep those assets under lock and key for eventual criminal forfeiture. *See* J.A. 90 (Assistant United States Attorney noting that "1345 allows for freezing of assets of equivalent value. The forfeiture statutes do not.").

For Petitioner, the end result of this statutory two-step is the restraint of *all* her assets, including those she could have used to retain her counsel of choice. The district court enjoined Petitioner from

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[6] In 2006, the Department of Justice represented to Congress that it uses § 1345 infrequently. Letter from William Moschella, Assistant Attorney General, to Hon. J. Dennis Hastert, Speaker, U.S. House of Representatives (May 25, 2006), http://tinyurl.com/pnaa5ua. And in the rare instances where it has pursued an injunction under § 1345 in tandem with a criminal asset forfeiture action, courts on several occasions have allowed for the release of funds to pay attorney's fees. *See United States v. Petters*, No. 08-5348 ADM/JSM, 2009 WL 803482, at *3-4 (D. Minn. Mar. 25, 2009); *United States v. Payment Processing*, 439 F. Supp. 2d 435, 440–41 (E.D. Pa. 2006).

disposing of any assets up to $45 million—an amount that represented *all* of the revenue her businesses had received from Medicare during a given period—despite testimony from a government witness that Petitioner had retained only a fraction of that amount.[7] Pet. App. 12-14. Because the $45 million figure represented an amount many times greater than Petitioner's net worth, *id.* at 12, 18, the order reached both the proceeds from the alleged crime currently in her possession and assets with no connection to it—i.e., property of "equivalent value," *id.* at 18. The Government and Petitioner stipulated that the restraint would likely reach assets that would otherwise be available to retain counsel. J.A. 161.

The court noted that the injunction would not have been permissible under the criminal forfeiture statutes. *See* J.A. 89-91. What it did not acknowledge was that § 1345 was not designed to provide the Government with an alternative means of depriving a criminal defendant of the ability to hire a lawyer. In contrast to the criminal forfeiture statutes, § 1345 does not operate as a punishment designed to deprive the accused of her "ill-gotten gains." The statute itself does not mention forfeiture or restitution, and its injunctive provisions are meant to "prevent a continuing and substantial injury" to

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[7] In entering the injunction, the court relied on the Government's allegation that Petitioner's *businesses* received $45 million from Medicare, Pet. App. 13-15, even though § 1345 allows only for an injunction against a "person" who intends to dispose of property "obtained as a result of ... a Federal health care offense" or "property of equivalent value," 18 U.S.C. § 1345(a).

the Government or others resulting from ongoing fraud, not to remedy past harms. 18 U.S.C. § 1345(b). Congress's concern in passing the statute was that, given the time often required to complete a criminal investigation, "innocent people [would] continue to be victimized while the investigation [was] in progress." S. Rep. No. 98-225, at 402 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3540; *see also id.* ("Experience has shown that even after indictment or the obtaining of a conviction, the perpetrators of fraudulent schemes continue to victimize the public.").

Nothing in the statute's text or history indicates that Congress intended the "equivalent property" provision to be used to enjoin a defendant from using funds for her criminal defense. And nothing suggests Congress meant § 1345 to be used to avoid the carefully crafted pretrial restraint limits in criminal asset forfeiture laws. Rather than giving the Government a claim to the proceeds of crime, § 1345 focuses on preventing further injury to victims until a criminal investigation is completed. *See United States v. Payment Processing*, 439 F. Supp. 2d 435, 441 (E.D. Pa. 2006) ("Section 1345 features no ... title reversion and instead focuses on preventing further injury to victims until a criminal investigation is completed.").

Using a civil remedy to help effectuate the criminal forfeiture the Government sought in this case also runs counter to the general principle that *civil* forfeiture is not available against untainted, "substitute" assets. Such actions—which are directed against the property itself, not its possessor—proceed on the fiction that the asset in question is

the wrongdoer, and is therefore subject to forfeiture. David B. Smith, *Prosecution and Defense of Forfeiture Cases* § 2.02 (2015). Accordingly, untainted—i.e. "innocent"—assets do not come within civil forfeiture's reach. Given that a federal court's traditional equitable powers do not include the authority to restrain assets pending judgment, *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-27 (1999), the Government's use of § 1345 to do what it could not via criminal forfeiture law is troubling.

There is a good reason that Congress and the courts have refused to condone pretrial restraint of substitute assets. Such power allows the Government to reach beyond a criminal defendant's alleged "ill-gotten gains" and potentially seize *all* of an individual's assets, crippling businesses and destroying livelihoods. *Ripinsky*, 20 F.3d at 364. Accordingly, courts have refused to extend the "drastic remedy" of pretrial restraint to the untainted assets of an individual merely accused of a crime. *See id.* at 365.

Recognizing that the "very potency" of pretrial asset restraint "demands that it be reasonably contained within ascertainable limits," *United States v. Saccoccia*, 354 F.3d 9, 15 (1st Cir. 2003), a number of Courts of Appeals have also held that due process requires that a defendant be granted a hearing to contest the forfeitability of property the Government wants to restrain under 21 U.S.C. § 853(e) and similar statutes. *See United States v. Farmer*, 274 F.3d 800, 805 (4th Cir. 2001) (listing cases); *United States v. Jones*, 160 F.3d 641, 647 (10th Cir. 1998); *United States v. Monsanto*, 924 F.2d 1186, 1197 (2d

Cir. 2001); *United States v. Moya-Gomez*, 860 F.2d 706, 725-30 (7th Cir. 1988); *cf. Kaley v. United States*, 134 S. Ct. 1090, 1108 (2014) (Roberts, C.J., dissenting) (noting that at a defendant's request a district court "constitutionally *must*" reassess a grand jury finding that the property in question is traceable to the alleged crime).[8] The deleterious effects that pretrial asset restraint can have on the Sixth Amendment right to counsel have figured prominently in such decisions. *See, e.g.*, *Jones*, 160 F.3d at 646 (under *Mathews v. Eldridge* balancing, the "essential" Sixth Amendment right to counsel of choice weighs in favor of requiring a pretrial traceability hearing).

The import of these decisions is clear: The "very potency" of the Government's broad authority to restrain a defendant's assets prior to trial demands that such authority be subject to meaningful constraints.

II. The Government's Interest In Forfeiture Does Not Outweigh A Defendant's Right To Spend Her Own Money On Counsel Of Choice.

The Government's circumvention of the limitations in criminal forfeiture law not only transgresses the statutory boundaries established by

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[8] At oral argument in *Kaley v. United States* the Government, too, acknowledged that due process "entitle[s]" a criminal defendant to a hearing "to show that the assets that are restrained are not actually the proceeds of the charged criminal offense." Transcript of Oral Argument at 45, *Kaley*, 134 S. Ct. at 1108.

Congress; it also violates a defendant's Sixth Amendment rights. As this Court has repeatedly recognized, the right to counsel of choice is a fundamental protection for criminal defendants facing charges of alleged wrongdoing. Denial of that right is not just an individual harm; improperly depriving the accused of the right to choose who will represent her undermines the integrity of the criminal justice system as a whole.

The distinction between tainted and untainted assets is significant in this respect. In *Caplin* this Court rejected the Petitioner's constitutional argument largely on the ground that the Sixth Amendment gives a defendant no right to "spend another person's money" for her defense. Even assuming that principle was a sound basis for the Court's earlier decisions, it has no application here: When a criminal defendant seeks to use untainted assets to hire a lawyer, she is spending no one's money but her own. The Government has no claim of priority to legitimate funds sufficient to overcome constitutional guarantees. And none of the justifications the *Caplin* Court offered for privileging the Government's interest in forfeiture over a defendant's Sixth Amendment rights withstand scrutiny.

A. The Constitution protects a criminal defendant's "vital interest" in retaining counsel of choice.

This Court has long recognized that the Sixth Amendment does not simply guarantee that a criminal defendant will have *a* lawyer; it also protects against government interference with the

accused's ability to select *the* lawyer she believes will best secure her rights. Given the crucial role an attorney plays in every aspect of an accused's defense, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), selection of a lawyer is effectively a decision about how best to preserve one's liberty in the face of the Government's power to punish, *see Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman ... requires the guiding hand of counsel at every step in the proceedings against him."). To deny a defendant the right to choose her lawyer is effectively to deprive her of the ability "to make [her] defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). It is therefore "hardly necessary to say that ... a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell*, 287 U.S. at 53.

In light of this tradition, the right to counsel of choice cannot be considered as simply an ancillary privilege to be discarded in favor of the government's interest in fighting crime; it is in fact "the root meaning of the constitutional guarantee" that the Framers of the Constitution enshrined in the Sixth Amendment. *Gonzalez-Lopez*, 548 U.S. at 147-48. Accordingly, while this Court has held that no one has a right to specific counsel they cannot afford, and no defendant can insist on being represented by a particular attorney who is unwilling to take on the task, *Caplin*, 491 U.S. at 624, as a general matter denial of the right to counsel of choice constitutes structural error, *Gonzalez-Lopez*, 548 U.S. at 150, mandating automatic reversal of a conviction because the error "undermine[s] the fairness of a criminal proceeding as a whole," *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013).

The damage wrought by improper deprivation of this right is not simply an individual concern. Our adversary system is predicated on the notion that robust advocacy "on both sides of a case" will help ensure that "the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring) ("[F]airness can rarely be obtained by ... one-sided determination of facts decisive of rights."). As a result, when the Government denies a defendant the right to be represented by counsel of choice, it is not only the accused who is injured; the judicial process itself equally suffers the consequences. *Cf. Kaley*, 134 S. Ct. at 1114 (Roberts, C.J., dissenting) (an "independent bar" serves as "a check on prosecutorial abuse and government overreaching").

Despite this Court's longstanding recognition of a defendant's "vital interest" in retaining counsel of her choosing, *id.* at 1102, the courts below in this case gave insufficient consideration to this right. To its credit, the district court at least acknowledged that the question of "whether a criminal defendant has a Sixth Amendment right to use untainted, substitute assets to retain counsel of choice" was "more difficult" than the questions addressed in *Caplin* and *Monsanto*. Pet. App. 30. But relying on a modified version of the bank robber analogy employed by this Court, the district court easily concluded that someone who steals and subsequently dissipates $100,000 has no right to use funds legitimately in his possession to pay for a lawyer. Pet. App. 32; *see also Caplin*, 491 U.S. at 626 ("A robbery suspect ... has no Sixth Amendment right to

use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended."). The Court of Appeals was even less deliberate; in a perfunctory opinion it simply asserted that Petitioner's Sixth Amendment argument was "foreclosed" by this Court's precedents. Pet. App. 3.

This conclusion was wrong. True, in *Caplin* this Court permitted the Government to interfere with a defendant's right to use *tainted* funds in her possession to hire counsel. The Sixth Amendment, the Court asserted, does not protect an individual's right "to spend another person's money" on a lawyer. *Caplin*, 491 U.S. at 626. While the Court admitted that limitations on the use of tainted assets necessarily impaired the ability of a defendant to select her counsel of choice, it found that the "strong governmental interest" in forfeiture overcame any constitutional objections. But the Court noted that nothing in its ruling prevented a defendant from using *legitimate* funds to pay for a lawyer. *See id.* at 625 ("The forfeiture statute does not prevent a defendant who has nonforfeitable assets from retaining any attorney of his choosing.").

The distinction between tainted and untainted assets—brushed aside by the courts below—makes all the difference. In the *Caplin* Court's view, a criminal defendant cannot legitimately transfer tainted assets to her lawyer because under the "relation back" doctrine, title to such assets vested in the government at the very moment the alleged offense was committed. *Id.* at 627; *see also* 21 U.S.C. § 853(c) ("All right, title, and interest in property described in [§ 853] vests in the United States upon the commission of the act giving rise to forfeiture

under this section."); *United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 125 (1993) ("Under the relation back doctrine, a decree of forfeiture ha[s] the effect of vesting title to the offending res in the Government as of the date of its offending conduct."). Because title to the assets vests in the Government the instant the crime occurs, any subsequent transfer—including to an attorney—is deemed a nullity. *See Caplin*, 491 U.S. at 627 ("[The defendant] cannot give good title to such property to [his lawyer] because he did not hold good title ....").

Whatever the merit of this logic, it is limited to tainted assets—it does not extend to the legitimate, untainted assets a defendant might have in her possession. By its terms, the relation-back provision in 21 U.S.C. § 853(c) does *not* apply to "substitute property." *See id.* (vesting in the United States title to property "described in subsection (a)," which does not address "substitute property" identified in subsection (p)); *United States v. Erpenbeck*, 682 F.3d 472, 477 (6th Cir. 2012) ("The relation-back clause [in § 853(c)] extends only to tainted property ...."); *United States v. Jarvis*, 499 F.3d 1196, 1204-05 (10th Cir. 2007) (similar). *But see United States v. McHan*, 345 F.3d 262, 272 (4th Cir. 2003) (holding that title to "substitute property" vests in the Government "at the time of the commission of the acts giving rise to the forfeiture").

In other words, a criminal defendant's untainted assets are not the Government's "property" at the time of the criminal offense. To the extent that the Government has any interest in such assets, it is inchoate and contingent upon securing a criminal conviction and substitute asset order. *See Jarvis*, 499

F.3d at 1205 ("The government's interest in [substitute property], if any, is only a potential and speculative future interest."). Analogizing to bankruptcy law, if the relation-back doctrine grants the Government the status of a secured creditor with a superior claim to the contested assets, the Government's interest in *untainted* assets is analogous to that of an unsecured creditor. Notably, such a creditor may be entitled to distribution from the debtor's estate only after the debtor's attorney's fees have been paid in full. *See* 11 U.S.C. § 507(a)(2) (administrative expenses have priority over general unsecured claims); *id.* § 503(b)(2) (debtor attorney's fees generally qualify as an administrative expense).

Accordingly, when a court refuses to release untainted assets, it is not preventing a defendant from "spend[ing] another person's money" to hire a lawyer. *Caplin*, 491 U.S. at 626. It is effectively forbidding the accused from spending *her own money* to exercise a fundamental constitutional right. *See Caplin*, 491 U.S. at 626 (noting an "individual's right to spend his own money to obtain the advice and assistance of ... counsel" (internal quotation marks omitted)); *Powell*, 287 U.S. at 53 (a defendant should have the opportunity "to secure counsel of his own"); *Chandler v. Fretag*, 348 U.S. 3, 9 (1954) (noting "the right to be heard through [one's] own counsel"). Nothing in the Constitution or this Court's precedents permits such an infringement of a criminal defendant's fundamental rights.

B. The governmental interests in forfeiture identified by this Court carry little weight in the present context.

In addition to relying on the legal fiction of government title to criminal proceeds, the *Caplin* Court identified three government interests that, in the Court's view, justified interference with a defendant's ability to use such assets to pay for counsel: funding law enforcement operations, providing restitution to victims, and combatting the economic power of criminal syndicates. *Caplin*, 491 U.S. 626-33; *see also Monsanto*, 491 U.S. at 616 (adopting the *Caplin* interest analysis). These "strong governmental interest[s]" in forfeitable assets, the Court found, outweighed any interest a defendant might have in using those assets to hire her counsel of choice. *Caplin & Drydale*, 491 U.S. at 631.

This aspect of *Caplin*'s reasoning has not survived the passage of time, and it certainly has no application to untainted assets. When viewed in light of the Government's actual practice in modern forfeiture cases, the Court erred in concluding that the "limited" burden forfeiture imposes on a defendant's right to counsel is justified by the Government's "strong" interest in taking possession of her assets. In short, the well-established right to retain counsel of choice far outweighs any interest the Government has in assets unrelated to the alleged offense.

1. The governmental interest in funding law enforcement through forfeited property does not justify denial of the right to use untainted funds to pay counsel of choice.

In describing the interest the Government had in being able to "obtain[] full recovery of all forfeitable assets," the *Caplin* Court first discussed the important role such property plays in funding law-enforcement activities. *Caplin*, 491 U.S. at 629. Assets deposited into the Department of Justice Assets Forfeiture Fund "support[] law-enforcement efforts in a variety of important and useful ways." *Id.* at 629; *see also Kaley*, 134 S. Ct. at 1094 (describing how law enforcement uses forfeited assets for activities such as police training). Because the funding generated for law enforcement activities is "substantial," the Government's interest in using forfeited assets in this way "should not be discounted." *Caplin*, 491 U.S. at 629.

Four years later, however, the Court recognized that the Government's direct pecuniary stake in asset forfeiture raises a real risk of overreach. In ruling that an adversarial hearing is required to justify seizures of real property, the Court emphasized that strong due process protections were of particular importance when "the Government has a direct pecuniary interest in the outcome of the proceeding." *United States v. James Daniel Good*, 510 U.S. 43, 56 (1993); *see also Harmelin v. Michigan*, 501 U.S. 957, 978-79 n.9 (1991) (Scalia, J., concurring) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit.").

The concern expressed in *James Daniel Good* over the Government's skewed incentives was a major change from *Caplin* and *Monsanto*, where the Court treated the Government's dependence on funding from asset forfeiture as a factor weighing *in favor* of deprivation of established constitutional rights. *See Caplin*, 491 U.S. at 629. But in the intervening four years a troubling fact had emerged: In 1990 the Attorney General issued a memorandum urging United States Attorneys to make "[e]very effort ... to increase forfeiture income" so as to meet the Department of Justice's annual budget goal. Executive Office for United States Attorneys, U.S. Dep't of Justice, 38 United States Attorney's Bulletin 180 (1990), *quoted in James Daniel Good*, 510 U.S. at 56 n.2. From the Court's perspective, the advent of "policing for profit" meant that the constitutional protections a defendant enjoys were all the more important for ensuring that the Government did not abuse its powers. *See id.* at 55 ("The purpose of an adversary hearing is to ensure the requisite neutrality that must inform all governmental decisionmaking."); *cf. Kaley*, 134 S. Ct. at 1114 (Roberts, C.J., dissenting) (an "independent bar" serves as "a check on prosecutorial abuse and government overreaching").

The concern articulated by the Court in *James Daniel Good* is even more pressing today. In fact, the Government's pecuniary stake in asset forfeiture prosecutions has become a topic of increasing public concern. In response to media reports of abusive

seizures in currency-structuring cases,[9] in October 2014 the Treasury Department significantly scaled back Internal Revenue Service asset seizures in cases in which the assets seized came from wholly legitimate sources, but had been deposited in a way that technically violated federal law governing currency transactions. *Statement of Richard Weber, Chief of I.R.S. Criminal Investigation*, N.Y. Times, Oct. 25, 2014. The Justice Department followed suit about six months later. U.S. Dep't of Justice, Policy Directive 15-3, Mar. 31, 2015. Along the same lines, the federal government has dramatically scaled back programs enabling local and state police to make seizures and then have them "adopted" by federal agencies, an approach that critics say evades state-law restrictions on asset seizure and threatens civil liberties. Press Release, U.S. Dep't of Justice, Attorney General Prohibits Federal Agency Adoptions of Assets Seized by State and Local Law Enforcement Agencies Except Where Needed to Protect Public Safety (Jan. 16, 2015), http://tinyurl.com/pq6hsck (last visited Aug. 21, 2015).[10]

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[9] *See, e.g.*, Shaila Dewan, *Law Lets I.R.S. Seize Accounts on Suspicion, No Crime Required*, N.Y. Times, Oct. 25, 2014; George F. Will, *The Heavy Hand of the IRS*, Wash. Post, Apr. 30, 2014; Nick Sibila, *IRS Seizes Over $100,000 From Innocent Small Business Owner, Despite Promise To End Raids*, Forbes Mag., May 5, 2015.

[10] *See, e.g.*, Karen Dillon, *Taking Cash Into Custody: Across U.S., Police Dodge State Seizure Laws*, Kan. City Star, May 21, 2000; Michael Salah, Robert O'Harrow, Jr. & Steven Rich, *Stop and Seize*, Wash. Post. Sept. 6, 2014; Sarah Stillman, *Taken*, New Yorker, Aug. 12, 2013.

This Executive Branch backpedaling has occurred against a backdrop of renewed Congressional interest in asset forfeiture reform. One proposed reform would eliminate law enforcement's financial interest in the outcome of a forfeiture matter by requiring that forfeited assets be deposited directly into the Treasury's General Fund rather than the Assets Forfeiture Funds. Fifth Amendment Integrity Restoration Act of 2015, H.R. 540, 114th Cong. § 3(b) (introduced Jan. 27, 2015). Other reforms would reach more broadly still. *See, e.g.*, *The Need to Reform Asset Forfeiture: Hearing Before the S. Comm. On the Judiciary*, 114th Cong. (Apr. 15, 2015) (statement of Sen. Grassley) ("A group of bipartisan, bicameral legislators is at work to develop a bill to reform asset forfeiture.").

In sum, what the Court in *Caplin* and *Monsanto* perceived to be a strong governmental interest that weighed in favor of a "full" forfeiture, including pretrial seizure, has proven through experience to promote skewed incentives and raise collateral hazards for civil liberties. This is all the more true in the context of untainted assets. As the Court acknowledged in *James Daniel Good*, the possibility that the Government's forfeiture conduct is shaped by its funding priorities is troubling enough when dealing with the disposition of assets allegedly derived from criminal conduct. When the Government is trying to take away a defendant's own assets—money that is needed to pay for counsel to defend against the charges at issue—the constitutional threat is that much greater.

2. The desire to provide restitution to victims does not justify denying an accused the right to spend her own funds on counsel of choice.

The *Caplin* Court described a second government interest justifying the power to seize assets needed to pay for counsel: Securing an "undiminished" forfeiture helps effect restitution—that is, "returning property ... to those wrongfully deprived or defrauded of it." 491 U.S. at 629. In particular, the Court noted that under § 853, "rightful owners" of forfeited assets could make claims to those assets "before they are retained by the Government." *Id.*

Even in regard to allegedly tainted assets, that asserted interest turns out to be far less weighty than *Caplin* assumed. The Court's analysis rested on § 853(n)(6)(A), a statutory provision allowing third parties with legitimate claims to seized assets to intervene before forfeiture is awarded to the Government. In practice, however, the Government has consistently opposed petitions for compensation by fraud victims under § 853(n)(6)(A). *See* U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 172 (2013) (instructing government attorneys to generally oppose efforts by fraud victims to interpose a claim of constructive trust in such cases).[11]

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[11] The Government prefers to deal with the interests of fraud victims through separate remission and restoration processes that occur after it succeeds in forfeiting the property, particularly in multiple-victim cases. *See* U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 172 (2013) (expressing preference for restitution through the "orderly" government

Even when a victim can overcome government opposition, recovery for fraud victims under § 853(n)(6) is not available in cases—like this one—involving untainted assets. Because a fraud victim is generally deemed to have surrendered title to his property when the fraudulent transaction is complete, victims have invoked constructive trust theory to assert a preexisting and specific interest in fraud proceeds sufficient to confer standing to maintain a § 853(n)(6)(A) petition as the rightful owner. *See, e.g.*, *Willis Mgmt. (Vermont), Ltd. v. United States*, 652 F.3d 236, 242-46 (2nd Cir. 2011); *United States v. Wilson*, 659 F.3d 947, 952-55 (9th Cir. 2011).

A constructive trust, however, can only reach assets obtained through wrongdoing or property traceable to those assets. *See* Stefan D. Cassella, *Asset Forfeiture Laws in the United States* 850 (2d ed. 2013) ("[T]he *sine qua non* of a constructive trust is the ability to trace the lost or fraudulently obtained property ...."). By definition, untainted "equivalent value" assets of the kind at issue in this case do not derive from the alleged offense conduct. Accordingly, a fraud victim seeking restitution of

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remission process rather than individual victim claims under § 853(n)(6)). The mechanisms the Government uses to provide restitution, however, afford victims limited rights of appeal, *see* 28 C.F.R. § 9.3(j)(3), and are often inferior to alternative means such as involuntary bankruptcy or the administration of a constructive trust, *see United States v. Frykholm*, 362 F.3d 413, 417 (7th Cir. 2004) (Easterbrook, J.) (noting that, unlike involuntary bankruptcy cases, the Government's standard asset-forfeiture approach to restitution "does not create a comprehensive means of collecting and distributing assets").

such assets via § 853(n) will not be able use constructive-trust theory to satisfy the requirement of a preexisting legal interest in the property. The restitution the *Caplin* Court envisioned, in other words, will be hard to come by.

3. The Government does not need to preclude defendants from hiring counsel in order to combat the kinds of crimes alleged here.

The third government forfeiture interest identified in *Caplin*—preventing racketeers from using crime proceeds to hire high-priced attorneys—also holds little sway. *See* 491 U.S. at 630. The objective of lessening the economic power of organized crime has little to do with this case, or with most actions the Government brings. Only a tiny sliver of federal prosecutions involve such organizations. *See* U.S. Dep't of Justice, *United States Attorneys' Annual Statistical Report* 11 (2013) (only 0.3% of all criminal prosecutions initiated by the United States Attorneys' in fiscal year 2013 fell into the category of organized crime). And whatever the merit of Congress's belief that the Government needs robust forfeiture authority because "traditional criminal sanctions" are "inadequate to deter" large-scale and highly profitable criminal enterprises, S. Rep. No. 98-225, at 191 (1983), *reprinted in* 1984 U.S.C.C.A.N 3182, 3374, ordinary measures are more than adequate to the task here. If the Government's goal is to cripple Petitioner's allegedly fraudulent medical businesses, it does not need to freeze all of her untainted assets and deny her a lawyer to do so; a simple felony criminal conviction for a health care offense will suffice. *See*

42 U.S.C. § 1320a-7(a)(1) (Secretary of Health and Human Services must exclude from participation in any Federal health care program anyone convicted of a criminal offense related to the delivery of services under Medicare).

Moreover, the Government is already well-equipped to take the profit out of crime even without the cudgel it seeks in this case. As explained above, statutes that define forfeitable property in very broad terms have been applied to empower the Government to seek forfeiture of assets far beyond what a defendant gained from her conduct. *See supra* 6-8. And courts have interpreted 21 U.S.C. § 853 in ways that enlarge the Government's forfeiture authority even further. For example, when a defendant is charged with conspiracy, courts have repeatedly held that forfeitable assets are not limited to property acquired wholly by the defendant, but jointly and severally encompasses property derived from those acting in concert. *See, e.g.*, *United States v. Roberts*, 660 F.3d 149, 165 (2d Cir. 2011) (joint and several liability in narcotics conspiracy); *United States v. Corrado*, 227 F.3d 543, 553 (6th Cir. 2000) (RICO conspiracy); *United States v. Pitt*, 193 F.3d 751, 765 (3d Cir. 1999) (money laundering conspiracy). *But see United States v. Cano-Flores*, No. 13-3051, 2015 WL 4666891, at *7 (D.C. Cir. Aug. 7, 2015) ("§ 853(a)(1) ... does not authorize imposition of a forfeiture based on the total revenues of a conspiracy simply because they may have been reasonably foreseeable.").

Courts have also failed to heed this Court's reminder that "forfeiture applies only to specific assets." *Kaley*, 134 S. Ct. at 1102 n.11. They

routinely grant the Government's request for a forfeiture "money judgment"—i.e., a forfeiture order against the defendant's general assets, to be paid out of assets she might acquire in the future (including after release from prison). *See United States v. Hampton*, 732 F.3d 687, 691 (6th Cir. 2013) (citing cases). This despite the fact that § 853's plain language limits forfeiture to "property constituting, or derived from, any proceeds the [defendant] obtained" as a result of her alleged criminal conduct. 21 U.S.C. § 853(a)(1). As a result, the Government asserts criminal forfeiture authority that effectively crosses the line from criminal proceeds to assets legitimately earned or acquired by the defendant long after the criminal case is over.

Even if the tools already at the Government's disposal were insufficient to combat effectively large-scale criminal organizations, the notion that the Government can deliberately tip the scales of justice in its favor by depriving a defendant of assets needed for her defense—even allegedly tainted ones—is disquieting, to say the least. *See Caplin*, 491 U.S. at 630 (it "may be somewhat unsettling" to imagine that the Government has a legitimate interest in using forfeiture to undermine a defendant's right to counsel of choice); *id.* at 635 (Blackmun, J., dissenting) ("[I]t is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial."). The idea that such hobbling can be effectuated by seizing a defendant's *legitimate* assets is more than troubling—it is indefensible.

C. The Sixth Amendment mandates reversal of the decisions below.

It is regrettable that for more than twenty-five years the balance between the Government's desire to recover assets and a defendant's Sixth Amendment right to counsel has been defined by *Caplin* and *Monsanto*. The Court was sharply divided in both of those cases, and it gave too much credit to governmental interests that have proven illusory or unjustified. Yet these two precedents now require the Court to decide whether the Sixth Amendment preserves the right of an accused to spend her own money to defend against felony criminal charges.

The courts below concluded too easily that the reasoning underlying this Court's prior cases mandates that the answer be no. The Sixth Amendment, they held, ultimately has nothing to say about pretrial restraint of substitute assets needed to pay for counsel of choice. As the preceding discussion explains, the opposite is true: The Sixth Amendment's guarantee of the right to counsel of choice *requires* that a court release from restraint sufficient funds for a criminal defendant to hire a lawyer.

The district court did not simply reject this categorical argument; in fact, in deciding whether to grant the injunction requested by the Government, the court declined to give any weight to Petitioner's Sixth Amendment rights at all. This, too, was a mistake. Despite the fact that proceedings under 18 U.S.C. § 1345 are governed by the Federal Rules of Civil Procedure, the court concluded that it did not

need to weigh the traditional factors governing injunctive relief, which include balancing the equities on both sides.[12] *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Had it done so, the court would have properly concluded that Petitioner's strong interest in exercising her right to representation by counsel of choice far outweighs the Government's interest in restraining assets that properly belong to her in the first instance. At minimum, this Court should reverse and remand so that the courts below can give proper consideration to the meaningful protections the Sixth Amendment offers criminal defendants against the Government's prosecutorial power.

CONCLUSION

Amici ask that this Court reverse the decision below.

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[12] The district court concluded that it did not need to apply the traditional factors because § 1345 expressly authorizes injunctive relief to protect the public interest. Pet. App. 5; *see also United States v. Diapulse Corp. of Am.*, 457 F.2d 25, 28 (2d Cir. 1972) (a statute that authorizes injunctive relief may be read as an implied Congressional finding that statutory violations harm the public). The court was wrong. Even if an injunction to prevent ongoing violations of § 1345 might in principle serve the public interest, preventing Petitioner from spending her own money to hire counsel does not. And the mere fact that Congress enacted § 1345 does not justify ignoring the other preliminary injunction factors—in particular, the balancing of the equities and the need to narrowly tailor injunctive relief to avoid burdening Constitutional guarantees.

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No. 14-419

IN THE
Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND THE DKT LIBERTY PROJECT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a "suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree?" *De Beers Consol. Mines, Ltd. v. United States*, 325 U. S. 212, 222 (1945).*

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* The answer, as we argue here, is "no, no he can't." *See Grupo Mexicano de Desarrollo, S.A., et al. v. Alliance Bond Fund, Inc., et al.*, 527 U.S. 308 (1999).

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INTEREST OF *AMICI CURIAE*[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The DKT Liberty Project was founded in 1997 to promote individual liberty against all levels of government, and to defend the right to privacy.

This case concerns *amici* because they, like equity, delight in justice.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici agree that the restraining order violates Petitioner's constitutional rights. We respectfully suggest, however, that this case isn't about criminal forfeiture or the Sixth Amendment. This is a case about equity—not "equity" as in fairness, or "natural justice"—but Equity: a discrete body of doctrines that federal courts administer alongside the common law in order to ensure that the strict enforcement of legal rights does not produce substantively unjust results.

Specifically, this case is about a court's equitable power to grant preliminary injunctions. Because such injunctions limit defendants' legal rights before

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[1] Rule 37 statement: Petitioner lodged a blanket consent to the filing of *amicus* briefs. A letter from Respondent consenting to the filing of this brief has been submitted to the Clerk. This brief was not authored in whole or in part by counsel for any party; no person or entity other than *amici* made a monetary contribution its preparation or submission.

any liability or wrongdoing has been proven, they are considered "extraordinary" remedies. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008). Not just because they are extraordinarily powerful, or because there is an extraordinary risk of injustice when they are misused, but because they are *extraordinary*. Atypical. Supra-normal. Preliminary injunctions are never awarded "as of right," *id.*, or in the ordinary course of litigation, *Harrisonville v. Dickey Clay Mfg.*, 289 U.S. 334, 337 (1933), but only when absolutely necessary to protect existing rights "against injuries otherwise irremediable." *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919).

Even where the extraordinary circumstances of a case might justify preliminary relief, a court is under no obligation to issue the injunction—it remains a matter of discretion; discretion bounded by clear limits. These limits were recently restated by this Court in *Winter*. "A plaintiff seeking a preliminary injunction must establish" that:

1) He is likely to win the underlying lawsuit;
2) He will likely suffer harm if the court does not grant an injunction;
3) The threatened injury is irreparable—*i.e.*, there is no legal remedy that could prevent the injury, or properly compensate him for his loss;
4) The harm he would suffer in the absence of an injunction outweighs the burden the injunction imposes on the defendant; and
5) The injunction would not be contrary to the public interest.

555 U.S. at 20.

Other tests must be met in particular cases, but each of the *Winter* criteria is a *sine qua non*, and this Court has made clear that granting preliminary relief in their absence is an abuse of discretion. *See, e.g., Munaf v. Geren*, 553 U.S. 674 (2008) (holding that a court's failure to consider the likelihood of success before issuing injunction is an abuse of discretion); *Amoco Production Co. v. Gambell*, 480 U.S. 531, 546 (1987) (a court errs in assuming an injunction is in the public interest without considering its actual consequences); *Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) (courts lack jurisdiction to enjoin future repetition of past constitutional injuries "[a]bsent a sufficient likelihood that [the plaintiff] will again be wronged in a similar way."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (district court abuses its discretion if it fails to consider the impact of its injunction on each party); *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) ("[C]ourts of equity should not act when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.").

That brings us to this case. On October 2, 2012, a grand jury handed down a sealed indictment finding that the U.S. Attorney had probable cause to charge the Petitioner and several others with multiple counts of healthcare fraud. Brief in Opp. at 4. That same day, the government filed a civil suit against the Petitioner seeking "disgorgement and restitution" of any "ill-gotten gains," and requesting preliminary relief in the form of a temporary restraining order (TRO) or injunction that would, *inter alia*, enjoin Luis from committing any "federal health care offense," require her to make detailed and ongoing

disclosures to the government about her personal finances, and freeze all of her assets, as well as any assets she might obtain in the future, up to $45 million. JA at 29–30.

The government claimed that the order it sought was authorized by 18 U.S.C. § 1345 and that, with respect to the freezing order, it was "entitled" to an injunction "upon a showing" that the Petitioner was "alienating or disposing" of unlawfully obtained property or intended to do so. The government has conceded that the assets subject to the freezing order are not the proceeds of fraud or otherwise traceable to any criminal violation. Instead, the government asserts that the assets are "property of equivalent value" that may be restrained under § 1345(a)2.

The district court agreed with the government's analysis and issued the requested TRO the next morning. The TRO was continued until June 2013, when it was replaced with a substantively identical preliminary injunction to "remain in force until further Order of the Court."

The lower courts rejected Luis's argument that the Sixth Amendment required the injunction to be modified to allow her to pay for counsel of choice. However the Court answers that question, the injunction itself is invalid—and must be vacated—even if it does not infringe Luis's constitutional rights, for three reasons:

1. *The district court lacked the equitable jurisdiction needed to freeze Luis's assets.*

Equitable courts protect rights, but they do not create them. "A Court of Chancery is not, any more than is a court of law, clothed with legislative power.

It may enforce, in its own appropriate way, the specific performance of an existing legal obligation but it cannot create the obligation." *Atchison, T. & S.F. R. Co. v. Denver & N.O. R. Co.*, 110 U.S. 667, 682 (1884). *See also* John Adams, *The Doctrine of Equity* xxxiv (8ed. 1890) (an equitable court "does not create rights but it gives effectual redress for the infringement of existing rights"). Where a plaintiff has no pre-existing proprietary interest in particular assets, a court has no equitable jurisdiction to interfere with the current title-holder's use or disposition of those assets. This Court has confirmed that when a plaintiff only seeks a personal-money judgement, the rule prevents district courts from freezing the defendant's assets to prevent their dissipation prior to judgment. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308 (1999). Because the government does not claim any existing interest Luis's property, the district court had no jurisdiction to freeze her assets.

Even if *Grupo Mexicano* weren't directly controlling, the injunction is still invalid for want of jurisdiction. A court only has jurisdiction to grant preliminary equitable relief where the plaintiff is threatened with a serious injury but has no legal remedy. The government is in the same position as an unsecured creditor or tort plaintiff prior to judgment on the merits: All it claims is that Luis owes it a certain amount of money. A plaintiff who would be made whole by a money judgment has suffered no irremediable injury and has no claim on the courts' equitable jurisdiction. *Hipp v. Babin*, 60 U.S. 271, 278 (1857) ("[W]henever a court of law is competent to take cognizance of a right, and has

power [provide] a plain, adequate, and complete remedy the plaintiff must proceed at law.").

2. *The district court failed to properly exercise its equitable discretion.*

Even if the facts *permitted* an injunction, the district court was still obligated to ensure that one was *warranted*. By treating the injunction as a "remedy" that the government was automatically entitled to, the district court broke with a long line of Supreme Court decisions rejecting the argument that Congress's creation of a new statutory basis for injunctive relief strips courts of the discretion to withhold an injunction or controls what factors they can consider. Discretion is necessary if equity is to serve justice: if courts cannot (or do not) consider the impact of preliminary injunctions on defendants (or the public), they cannot be sure that their equitable powers are not being twisted to malicious or unjust ends.

3. The injunction is unjust.

A preliminary junction is unjustified where the burden imposed on the defendant is greater than the threatened injury to the plaintiff. In absolute financial terms, the loss or putative loss to each party is roughly equal: the injunction deprives Luis of the use of $2,000,000, and the government fears that without the injunction it will be less easily able to recover $2,000,000. Where equities are equal, legal rights prevail. But the equities are not equal. Probable constitutional violations aside, the suffering that results from losing $2,000,000, even temporarily, is far greater for an individual—especially when it represents her entire net worth—

than it is for the government, or any other entity with a budget measured in billions and trillions. Nor is it in the "public interest" to restrain assets needed to pay counsel. If the injunction is not modified to allow Luis sufficient funds to hire an attorney, the taxpayers will be forced to foot the bill for her defense. Finally, *Winter* requires a plaintiff to show that, absent the injunction, injury is not just possible, but likely. 555 U.S. at 22. ("We agree that the Ninth Circuit's "possibility" standard is too lenient. Our frequently reiterated standard requires plaintiffs to demonstrate that irreparable injury is *likely*.") (emphasis in original.).

The probability of future injury to the government was not established by a grand jury's finding that it had "probable cause" to believe assets had been dissipated *in the past*. Other remedies available to the government greatly reduce the likelihood that it would suffer any loss in the injunction's absence. In sum, because the district court issued an injunction that was (a) unnecessary, (b) unjustifiable under *Winter*, and (c) contrary to established Supreme Court precedent, the decision below should be reversed and the injunction vacated.

ARGUMENT

I. THE DISTRICT COURT EXCEEDED ITS EQUITABLE JURISDICTION

"Equity jurisdiction extends to and embraces all civil cases, *and none others*, in which there is not full, adequate, and complete remedy at law." 1 Pomeroy § 132 (emphasis added).

A. The Nature and Scope of the District Court's Jurisdiction

The equitable jurisdiction vested in federal courts "is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution." *Grupo Mexicano*, 527 U.S. at 318 (quoting Armistead Mason Dobie, *Handbook of Federal Jurisdiction and Procedure* 660 (1928)). While that vast jurisdiction defies exact definition or a detailed survey, we know something of the terrain. Equity can be divided into three regions, defined by the justification each offers for equity's interference: its primary jurisdiction (concerning rights and obligations sounding only in Equity); its concurrent jurisdiction (consisting of suits that properly belong to the Law, but become the concern of Equity for some reason—*e.g.*, because one party is a charity); and its auxiliary jurisdiction (instances where Equity interferes with purely legal matters to prevent injustice). 1 Pomeroy § 122.

The government's suit could only be considered under Equity's auxiliary jurisdiction. The government claims no equitable interest in Luis's property. Whether it is called restitution, forfeiture, or compensatory damages, the government's claim that Luis owes it $45 million sounds in Law, not Equity. The claim is based on statute—21 U.S.C. § 853 (by way of 18 U.S.C. § 982(b)(1)), Brief in Opposition at 3—and the "general rule" is that where a statute provides for monetary relief, under any name, that a *legal* remedy for a *legal* cause of action has been created. *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990). This presumption is strongest where the remedy is clearly punitive or

compensatory in nature. *See, e.g., Feltner v. Columbia Pictures*, 523 U.S. 340 (1998); *Tull v. United States*, 481 U.S. 412 (1987); *Curtis v. Loether*, 415 U.S. 189 (1974). In this case, the government claims a double interest in the monetary award: compensating the victim and punishing the defendant. Combined with the fact that the quantum demanded—$45 million—represents the alleged loss to the victim, rather than Luis's purported profits (which would be characteristic of an equitable remedy), the government's cause of action is obviously legal, not equitable.

Where legal and equitable jurisdictions have been joined, the distinction between these three "regions" of Equity is largely obsolete, but it is still relevant when determining the availability of equitable relief. All remedies are available in cases arising under Equity's primary jurisdiction, but in all other cases Equity's remedial jurisdiction only extends to suits involving "rights, recognized and protected by [the law], where a complete remedy cannot be had in the Courts of Common Law." 1 Story § 33.

B. The Government Has Adequate Legal Remedies

While § 853 makes it clear that the government's asserted right is "recognized and protected" in Law, the government still has the burden of showing that it has no adequate legal remedy—that it faces an "irreparable" injury—a rather Herculean task given § 853's creation of an exceptionally generous legal remedy and the longstanding rule that legal damages are a complete remedy for pure economic loss. Cf. *Mertens v. Hewitt Associates*, 508 U.S. 248, 255 (1993) ("[W]hat petitioners in fact seek is

nothing other than compensatory *damages*—monetary relief for all losses Money damages are, of course, the classic form of *legal* relief.") (emphasis in original). For a freezing order to be remotely near the district court's equitable jurisdiction, the government would have to show that a legal money judgment—either damages generally, or the specific remedies provided by the forfeiture statutes—would not be an adequate remedy. *See, e.g., Grupo Mexicano*, 527 U.S. at 340 (Ginsburg, J., dissenting) ("[P]rovisional freeze orders would be appropriate in damages actions only upon a finding that, without the freeze, the movant would be unable to collect a money judgment." (quotations omitted).

While not explicitly pleaded, the government's argument on this point seems to be that, without the injunction, a money award would not be an adequate remedy because the government would not be made whole if Luis is permitted to dissipate or shelter her assets before the judgment could be executed.

This is a superficially plausible argument. Historically, it was well within an equitable court's jurisdiction to provide injunctive or other equitable relief where circumstance made the available legal remedies inadequate or inefficient. 1 Pomeroy § 139. Here, that argument is foreclosed by this Court's precedents and further invalidated by the availability of sufficient preliminary legal remedies.

1. **This case is controlled by *Grupo Mexicano*.**

This is not a question of first impression. This Court has explicitly held that district courts lack "the power to issue a preliminary injunction preventing [a] defendant from transferring assets in which no

lien or equitable interest is claimed." *Grupo Mexicano*, 527 U.S. at 310.

Here, the government's position is the same as the plaintiff's in *Grupo Mexicano*. Both claimed to be owed a fixed sum of money. Neither claimed an existing legal or equitable interest in their respective defendants' property. Both feared that their defendants would (willfully or otherwise) become insolvent before a favorable judgment on the claimed debt could be obtained and executed. Out of this fear, both sought freezing orders.

In *Grupo Mexicano*, this Court ruled that a pre-judgment freezing order where a plaintiff only sought money damages was unequivocally beyond a district court's equitable jurisdiction. Fifteen years later, there is no reason to revisit that decision, especially given that "[n]o relief of this character has been thought justified in the long history of equity jurisprudence." *De Beers Consol. Mines v. United States*, 325 U.S. 212, 223 (1945).

That "long history" extends at least as far back as Francis Bacon's tenure as Lord Chancellor. In an attempt to curb the injustices that were common under his immediate predecessors, Bacon promulgated his *Ordinances for the Better and More Regular Administration of Justice in the Chancery*, a set of rules standardizing the scope of equitable courts' powers and limiting their discretion. One rule Bacon thought it necessary to codify was that "[i]njunctions for possession are not to be granted before a decree." Ordinance 26. Reprinted in Vol. II *The Works of Francis Bacon* 485 (Philadelphia, 1841).

Luis's legal title is not contested, and the district court correctly recognized that the freezing order was a deprivation of property that implicated her rights under the Due Process Clause. While the court weighed that deprivation against government interests to determine whether Luis was entitled to a *Mathews* hearing, Pet. App. at 16-17, it failed to consider whether those same interests were sufficient to justify that deprivation *in equity*.

The rule reflected in Bacon's *Ordinances* and *Grupo Mexicano*, is the logical consequence of the maxim that "equity follows the law," and equitable courts' historic reluctance to interfere with legal title. It is a truism "admitting of no dispute" that "wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights but in all such instances the maxim *equitas sequitur legem* is strictly applicable." *Magniac v. Thomson*, 56 U.S. 281, 299 (1853).

2. There is a legal alternative to § 1345.

The dissent in *Grupo Mexicano* argued, not without merit, that the equitable jurisdiction of American courts ought to be defined "in relation to the principles of equity existing at the separation of this country from England," not just "the specific practices and remedies of the pre-Revolutionary Chancellor." 527 U.S. at 336 (Ginsburg, J., dissenting). One of the limiting (or defining) principles of equity this Court "long ago recognized" is that courts "properly exercise their equitable jurisdiction where the remedy in equity could alone furnish relief," and, for that reason, the dissent would have allowed the injunction since the plaintiff

had shown that it had "no adequate remedy at law." *Id.* (citation and quotations omitted).

Both opinions in *Grupo Mexicano* agreed that for every form of equitable relief requested—be it final or preliminary in nature—the plaintiff must show that he has no suitable remedy in law. Justice Joseph Story tells us that "the remedy must be plain; for, if it be doubtful or obscure at law, Equity will assert a jurisdiction." 1 Story § 33. The question then becomes whether or not there is an obvious and adequate *legal* alternative to a freezing order?

Following *Heien v. North Carolina*, 135 S. Ct. 530 (2014), governments and their officers are no longer presumed to have knowledge of every statutory provision they enforce. That being said, Cornell University has made the entire U.S. Code available online, and if you Google "federal prejudgment remedies" the first result is "28 U.S.C. § 3101 Prejudgment Remedies." https://goo.gl/7y1ZVx (last visited Aug. 23, 2015). While it doesn't merit a mention in the U.S. Attorneys Manual, or the new special "Asset Forfeiture Manual," U.S. Attorneys in Florida have used such remedies to ensure the availability of assets in Medicare fraud cases. *See, e.g., Ex rel. Doe v. DeGregorio*, 510 F. Supp. 2d 877 (M.D. Fla. 2007).

Attachment is a "remedy at law" over which "equity has no jurisdiction." It is a "proceeding to create and enforce a lien. It is a remedy for the collection of an ordinary debt by a preliminary levy upon property of the debtor, to preserve it to the creditor until his lien shall have been perfected by judgment. It is a remedy entirely statutory." John

Lawson, 7 *Rights, Remedies, and Practice* § 3498-99 (San Francisco, 1890).

Federal law allows the government to obtain a writ of attachment at any point during a suit to recover a debt—including claims based on the imposition of a "fine, assessment, penalty, restitution, [or] damages" 28 U.S.C. § 3002(3)(b)—where there is "reasonable cause to believe" that the defendant is going to flee the jurisdiction or "assign, dispose, remove, conceal, ill treat, waste, or destroy property," 28 U.S.C. § 3101(b). An application for a writ of attachment need only be supported by an affidavit "establishing with particularity to the court's satisfaction the probable validity of the claim for a debt" the amount of the debt, and the grounds justifying the writ. 28 U.S.C. § 3101(c).

Assets subject to a writ of attachment include "any property in the possession, custody, or control of the debtor, and in which the debtor has a substantial nonexempt interest," up to the full value of the debt, plus interest and costs, 28 U.S.C. §§ 3102 (a) & (b)—*i.e.*, any property that could actually be used to satisfy an eventual judgment. No bond is demanded of the government, and the U.S. Marshal's office is given broad power to execute and enforce the writ, including taking physical possession of property in order to secure it. Further writs will issue to garnish earnings, sequester income, and appoint receivers.

Since pre-judgment attachment is an obvious and satisfactory legal remedy, the government had neither the need nor the right to invoke a court's equitable jurisdiction. But it still wanted to, possibly because injunctions are *really* convenient. And why should the government be inconvenienced in 2015 by

centuries-old "prudential restrictions on the use of equity powers [that] arose in practice from the historical circumstance that actions at law and suits in equity were originally entertained by different courts, which were at once both jealous of their own prerogatives and conscious of the need to preserve comity by observing certain boundaries"? Brief of the United States as *Amicus Curiae* in Support of Respondent at 11, *Grupo Mexicano*, 527 U.S. 308 (1998). For that matter, why should the government be so inconvenienced as to afford property owners basic procedural protections, like notice and a hearing—as it would have to in order to obtain a writ of attachment?

After all, that ancient dispute between the Chancellor and the Chief Justice was just two silly old men fighting over who had the biggest wig; it had nothing to do with fundamental concepts of fair play, judicial independence, or limiting the power of public officials to throw men into the dungeon whenever they thought public morals demanded it.

II. THE DISTRICT COURT'S FAILURE TO EXERCISE ITS EQUITABLE DESCRETION INVALIDATES THE INJUNCTION

In the hands of a Bacon, Eldon, Kent, Camden, or Story, the discretion of equity is its greatest strength and virtue. "It goes without saying that an injunction is an equitable remedy. It is not a remedy which issues as of course." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (internal quotations omitted). Holding that any party—even (especially?) the government—is generally entitled to injunctive relief is contrary to the very "essence of equity

jurisdiction," which is the courts' power "to mould each decree to the necessities of the particular case. Flexibility, rather than rigidity, has distinguished it." *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944). The decision to issue an injunction is an exercise of "equitable discretion," a discretion "which must include the ability to deny as well as grant injunctive relief." *Weinberger*, 456 U.S. at 320.

Here, the government has claimed that it is "entitled" to a freezing order whenever it can make "a showing" that allegedly forfeitable property has or will be dissipated. *See, e.g.*, JA at 21. Though entirely unjustified given this Court's clear restatement in *Winter* that a "preliminary injunction is an extraordinary remedy never awarded as of right," 555 U.S. at 24, this argument persuaded the district court to rule that "because the United States' motion is based upon 18 U.S.C. § 1345, which expressly authorizes injunctive relief to protect the public interest, no specific finding of irreparable harm is necessary, no showing of the inadequacy of other remedies at law is necessary, and no balancing of the interests of the parties is required prior to the issuance of a temporary restraining order in this case." JA at 57.[2]

Because preliminary relief can impose significant burdens on defendants, this Court has made it very clear that this exercise of equitable discretion can only even be considered once the moving party establishes "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in

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[2] An almost identical paragraph was included when the TRO was converted to a preliminary injunction. Pet. App. at 5.

the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20.

The district court failed to give any consideration to these factors on the basis that "a reasonable reading of § 1345" only requires the government to establish "that: (1) a Federal health care offense has been committed; (2) the total amount of proceeds obtained from the criminal activity; and (3) that there has been dissipation of assets received as a result of the criminal activity." Pet. App. at 10.[3]

A. Statutory Authorization Does Not Relieve a Court of the Need to Exercise Sound Discretion

The proposition that "every matter that happens inconsistent with the design of the legislator may find relief in Equity" is "untenable." 1 Story § 14. While Congress does have the power to statutorily restrict a federal court's equitable discretion, the bare "grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger*, 456 U.S. at 313. Akin to the manner in which Congress legislates against the backdrop of the common law, there is a strong presumption that when Congress creates a basis for injunctive relief, it

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[3] This Court has held that a court's failure to consider *one* of the traditional factors before granting injunctive relief is an abuse of discretion. See *supra* at 3-4. *A fortiori* failure to consider all of the *Winter* factors is not just an abuse of discretion, but clearly erroneous.

does so knowing the "requirements of equity practice" arising from "several hundred years of history." *Hecht*, 321 U.S. at 329.

A statutorily authorized appeal to a court's equitable powers should be decided according to the traditional rules and principles that have historically governed an equitable court's discretion. Creating a presumption that the government is *entitled* to injunctive relief without demonstrating a likelihood of "irreparable harm and other usual prerequisites for injunctive relief," *Rondeau v. Mosinee Paper Co.*, 422 U.S. 49 , 65 (1975), would be a "major departure from that long tradition" and should not "be lightly implied." *Hecht*, 321 U.S. at 330. Even if *one* "reasonable reading" of § 1345 imposes this incredible limit on equitable discretion, that reading does not govern so long as another legitimate interpretation exists "which affords a full opportunity for equity courts to treat enforcement proceedings under [§ 1345] in accordance with their traditional practices." *Id.*

The district court's interpretation of § 1345 is incompatible with this Court's admirable unwillingness to see "the great principles of equity" yield to "light inferences, or doubtful construction." *Brown v. Swann*, 35 U.S. 497, 503 (1836). The "comprehensiveness" of equitable discretion is too important to be "limited or denied" on the basis of a prosecutor's mere "reasonable reading" of the law. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

B. The Government's Reading of § 1345 Is Not Even Reasonable

Although *Porter* requires a "clear and valid legislative command," *id.*, before recognizing any curtailment of equitable discretion, even if the far lower standard of a "reasonable reading" were to be applied, §1345 does not support the construction urged by the government.

In *Hecht*, this Court declined several invitations to treat § 205(a) of the Emergency Price Control Act of 1942 (EPCA) as imposing any limitation on its equitable discretion. Section 205(a) read:

> Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation [of] this Act he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provisions, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

56 Stat. 23, 50 U.S.C. App. Supp. II, §§ 901, 925, as quoted in *Hecht*, 321 U.S. at 321-22.

As here, the respondent in *Hecht* insisted "that the mandatory character" of the statute was "clear from its language, history, and purpose." 321 U.S. at 326. This Court disagreed. The EPCA didn't compel courts to issue injunctions, even though the statute said that such orders "shall" be granted, because it was "apparent on the face of § 205(a) that there is

some room for the exercise of discretion on the part of the court. For the requirement is that a 'permanent or temporary injunction, restraining order, or other order' be granted. Though the Administrator asks for an injunction, some 'other order' might be more appropriate." *Id.* at 328.

Two years later, this Court rejected a similar yet distinct argument. In *Porter*, the government asked for equitable restitution as well as injunctive relief. The defendant argued that there was no jurisdiction to order restitution, because § 205(a) only authorized injunctive relief. This Court disagreed: by authorizing injunctive relief, §205(a) was a clear invocation of the courts' "inherent equitable jurisdiction" and though subsection (a) did not expressly provide for restitution (or other non-injunctive relief), there was no "other provision of the Act that expressly or impliedly preclude[d] a court from ordering restitution in the exercise of its equity jurisdiction." *Porter*, 328 U.S. at 403. Section 205(a) could not reasonably be read as imposing any limits on the courts' equitable discretion.

The operative language in § 1345 is practically identical to § 205(a); if anything, it's more permissive. Both statutes provide that the responsible government official (the EPCA administrator and the attorney general, respectively) "may" apply to the courts for injunctive relief in certain circumstances, and both statutes explicitly authorize the courts to grant injunctions or other relief—in the case of §205(a), some "other order," and under § 1345 "other [remedial] action, as is warranted."

The only significant difference between the two provisions is that § 205(a) was written as one continuous paragraph while § 1345 is broken into sections and subsections. As a result, while both say that any order "shall be granted without bond," in the case of §205(a), the imperative "shall" could arguably (if not reasonably) be read as applying generally: if the government shows XYZ, then the court *must* grant relief and no bond will attach. In contrast, the structural arrangement of § 1345 makes clear that the identical phrase ("shall be granted without bond") does not obligate the grant of any order. The only reasonable interpretation is that the court cannot require the government to put up a bond as a condition for granting whatever relief, if any, it deems appropriate.

C. Congress Can't Compel Injunctive Relief

A recurring theme in these cases is that Congress possesses the power to direct and control a court's equitable discretion, but only if that power is explicitly and undeniably invoked. That is a huge misinterpretation of the relationship between the legislative and judicial branches. If § 1345 read, "whenever a person is alienating or dissipating property possibly obtained through healthcare fraud, a district court *must* grant a TRO or preliminary injunction freezing all the defendant's assets," would this Court seriously consider that to be a valid exercise of the legislative power?

If so, where is the limit? Can Congress compel courts to hold individuals in contempt? If Congress can legislatively entitle the executive to preliminary injunctions, what about permanent injunctions? Could it vary or do away with other equitable

principles? Could it simply reverse this Court's recent decision in *United States v. Wong*, 135 S. Ct. 1625 (2015), by passing a law saying that even a nonjurisdictional statute of limitations cannot be equitably tolled? Could it obliterate an innocent spouse's equitable interests as against the IRS?

As far as *amici* can tell, the only case to actually suggest that this power exists is *TVA v. Hill*, 437 U.S. 153 (1978), a case which has almost certainly been misinterpreted. *Hill* is to Equity what *Chaplinksy* is to the First Amendment. Both cases are frequently cited for legal propositions that are only recognized to be distinguished, probably don't actually exist, and wouldn't be constitutionally valid if they did. Despite being the obligatory (and sole) cite whenever a court wants to acknowledge that Congress *could have* mandated injunctive relief, but didn't—that was not the basis on which *Hill* was decided.

Hill was resolved through the direct application of standard principles of equity—not slavish deference to Congress. The Court was faced with a conflict between a law telling every government agency: "whatever you do, don't kill snail darters. As far as the Federal Government is concerned, these fish are more important than your average non-American human being" and a government construction project that would have killed every snail darter in existence. *Id.* at 161-62. If the threatened injury was allowed to occur, nothing could be done to "turn back the clock." Once extinct, snail darters would be gone forever.

An injunction was *compelled* in *Hill*, but not by Congress. The Endangered Species Act (ESA) did not

specifically command the courts to enjoin the completion of the dam, or even more generally any activity that threatened endangered species. What compelled the injunction was the absence of any other remotely suitable remedy. Damages wouldn't bring snail darters back to life and while fines might "punish" the government agency (*i.e.*, the tax payer), the ESA's primary purpose was not punitive but protective. The only way to fulfill that purpose and save the fish was to enjoin completion of the dam.

III. THE INJUNCTION WAS UNJUSTIFIED

A. The Government Has Not Shown that It Is Likely to Succeed on the Merits

A preliminary injunction is improper unless the plaintiff provides sufficient evidence to show that he is likely to prevail in his "ultimate legal claim." *Winter*, 555 U.S. at 20. The government's underlying claim is based on § 853. To secure forfeiture of substitute assets under § 853(p), the government needs to prove: (1) all the elements of the alleged health care fraud; (2) that Luis at one point possessed property that could be specifically identified as the proceeds of the underlying fraud; and (3) that she alienated or hid those assets. Because forfeiture is a punitive measure in addition to whatever sentence accompanies conviction for the underlying fraud, the government's case on each point will have to be "submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also S. Union Co. v. United States*, 132 S. Ct. 2344, 2350 (2012).

In order for the injunction to be valid, the government must have shown that it had a

sufficiently strong case justifying the district court's conclusion that the government would "likely" be able to prove all the elements of its claim to a criminal jury. Given that the only real "evidence" presented to the court was the affidavit of an investigating agent, this seems unlikely. In addition to the Petitioner's detailed discussion of the insubstantiality of the government's case, *e.g.*, Pet. Br. 7-14, *amici* offer two further arguments:

1. The indictment is irrelevant.

Kaley v. United States held that where a statute required the government to prove certain facts under a "probable cause" standard as a prerequisite to freezing a defendant's assets, the district court should not look behind a grand jury's findings because a "true bill" containing those facts is conclusive evidence that probable cause exists, and the grand jury's authority in these matters is "inviolable." 134 S. Ct. 1090, 1097-98 (2014).

Whatever validity there is in the reasoning behind that rule, it does not extend to the analysis required by *Winter*. Even if an indictment is conclusive evidence that there is probable cause to believe the government's claims—*i.e.*, the case is not "baseless," *id.* at 1097, the government is proceeding on something more than a merely reasonable suspicion, and there exist "facts and circumstances sufficient to warrant a prudent man in believing" that the allegations are true, *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (internal quotations omitted)—that is all it conclusively establishes. Evidence, however "inviolable," that the government was able to convince a grand jury that a prosecution isn't just based on a hunch, doesn't establish that prosecutors

will be able to prove everything required by § 853(p) beyond a reasonable doubt.

2. On its face, the facts alleged in the complaint contradict the government's claim for relief.

Section 853 only allows forfeiture of substitute assets where the government can show that the defendant possessed "property constituting, or derived from, any proceeds" of the underlying criminal act, 21 U.S.C. § 853(a)(1), which she then caused to be unavailable. The injunction reaches all of Luis's assets up to $45 million. But if everything in the government's complaint is taken as true, Luis never possessed anywhere near that amount—and if substitute assets are only reachable "up to the value" of forfeitable property that was once in the defendant's possession, 21 U.S.C. § 853(p)(2), Luis's liability is capped at the amount of tainted funds alleged to have been in her possession, or "approximately $4.49 million." JA at 27.

Even for that lesser amount, Luis's liability is dubious. The government acknowledges that at least some of that money consisted of Luis's salary as an employee of LTC and Professional Home Care. *Id.* at 50. A salary, even if paid by the employer from unlawfully acquired funds, cannot be considered to be the "proceeds" of crime. *See, e.g., United States v. Santos*, 128 S. Ct. 2020 (2008) (holding that "salaries" paid to the *de facto* employees of an illegal gambling operation were not the proceeds of crime.).

B. The Government's Injury Is Not the Sort that Merits Injunctive Relief

Under *Winter*, the moving party must demonstrate that an injunction is the only way to

prevent a legally incurable injury. The injury must not just be "irreparable"—it must also be substantial, for equity "will not restrain an act the injurious consequences of which are merely trifling." *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900). And, most importantly, the injunction must be able to prevent the injury. *Doran v. Salem Inn*, 422 U.S. 922, 931 (1975) ("The traditional standard for granting a preliminary injunction requires the plaintiff to show that, in the absence of its issuance, he will suffer irreparable injury.").

Taking the government at its word, the feared injury is that Medicare will be unable to recover $45 million. Is this injury so "great" as to justify equity's interference? This must be judged in context. $45 million *sounds* like a lot of money, but it represents less than 3% of Medicare's *daily* expenditures. Centers for Medicare & Medicaid Services, *NHE Fact Sheet*, available at https://goo.gl/VauCNI (last modified July 28, 2015). If *everything* the government says is true, then Luis defrauded Medicare of an amount that it normally spends every 40 minutes.[4] Given that Medicare is expected to run out of money in about 15 years, Nick Timiraos, *Social Security, Medicare Outlook: Better but Still Bleak*, Wall St. J., July 22, 2015, available at http://goo.gl/xOTEQ9, arguing that its inability to recover $45 million would be a noticeable, let alone "great," injury is about as reasonable as claiming

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[4] The number is further overstated because, even as the government argues that all of the money Medicare paid was "tainted" by fraud, it accepts that some services were rendered.

that a fish is the legal equivalent of a filing cabinet, or that seizing a farmer's raisins is not a taking.

Nor can the government argue that this *specific* injunction is necessary to deter broader Medicare fraud. Questions of general deterrence, like punitive damages, are not proper considerations when granting equitable relief. Equity is concerned with protecting *particular* rights, not preventing criminal behavior generally. 1 Pomeroy § 129.

As a factual matter, it is simply not true "that unless the injunction sought is available, federal law will exercise no deterrent effect in these circumstances." *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). Fraudsters still face significant criminal sentences, along with all the other accessory consequences of conviction. The government is also able to protect its prejudgment interests with attachment orders, and any unsatisfied portion of a forfeiture or restitution order becomes a non-dischargeable debt that can be enforced against any future bounty. 11 U.S.C. § 523(7). "Considering the availability of other avenues of relief [and deterrence] open to respondents for the serious conduct they assert," the injunction was improper. *O'Shea*, 414 U.S. at 504.

Finally, this is not even an injury that the injunction prevents. Luis does not have $45 million, or even the $4.5 million that the government specifically alleges she obtained through fraudulent means. Including the full value of property and accounts in which she has a partial interest, the district court estimated Luis's net worth to be "a

couple million dollars." JA at 87.[5] With or without a freezing order, Medicare will not be able to squeeze anywhere near $45 million out of Sila Luis.

Yet "equity will not do a vain and imperfect act." *Tobey v. County of Bristol*, 3 Story 800 § 70 (1845) (dismissing plaintiff's bill because no permissible injunction would afford "any relief whatsoever to the plaintiff, however strong his claims may be"). Because freezing Luis's comparatively meagre assets does not offer Medicare any protection against a significant injury, the order is incompatible with *Winter*'s requirement that the plaintiff be "likely to suffer irreparable harm in the absence of preliminary relief." 555 U.S. at 20.

C. The Government's Loss Pales in Comparison to Luis's

The government argues that there is no need to "balance the equities" where a statute authorizes injunctive relief because the statute is itself the result of Congress's balancing of competing policy interests. As weak as this argument is, it is an indispensable part of the government's claim: If there was no statutory preemption, the government would have to make a clear showing that its feared injuries outweighed the burden the injunction imposes on Luis—a showing it cannot make.

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[5] While these assets are subject to the freezing order, they may not actually be available for satisfaction of any judgment under 11 U.S.C. § 522 and other exemption provisions.

1. This is a decision for the courts, not Congress.

Eight years ago in *Winter*, the solicitor general argued that a statutorily authorized injunction had to be set aside because the "Ninth Circuit fundamentally misapplied established equitable principles" by failing to make "any attempt to weigh the magnitude of potential harm to one party against the harm to the other." Brief of the Petitioner, 18 & 47, *Winter*, 555 U.S. 7 (2008). This Court agreed with that part of the government's argument but rejected the further claim that once "Congress has established the priority of interests courts of equity lack authority to disregard that balance." *Id.* at 18.

While the Court ultimately ruled in the government's favor, it did so because "the balance of equities [tipped] strongly in favor of the Navy." *Winter*, 555 U.S. at 26. Importantly, the Court reached that conclusion after reviewing the entire record and the harms alleged by each party and did not consider its equitable discretion limited by a statutorily expressed "priority of interests." The lower courts abused their discretion in *Winter*, not because they failed to defer to Congress's judgment but because they failed to properly exercise their own. Specifically, they "failed to give sufficient weight" to the injuries the injunction inflicted. *Id.* at 29.

2. Where equities or injuries are equal, the law prevails.

Before granting injunctive relief, the Court must weigh the parties' "competing claims of injury and must consider the effect on each party of the

granting or withholding of the requested relief." *Amoco Prod. Co.*, 480 U.S. at 553. In a normal case, this requires the sort of subjective comparisons of inherently immeasurable values and interests that pervade constitutional law: which is more important, a well-trained Navy or the health of whales? You can't put a price on either. The infinitely variable ways in which these values can conflict necessitates a resolution by a court with casuistic discretion. A bright-line rule would be entirely unworkable.

But this isn't your typical case. The nature of a freezing injunction means that the court knows, prior to its decision and with absolute certainty, the injuries facing each party. More importantly, those injuries will not just be of the same kind, they will be identical—at least in an absolute fiscal sense. Here there are two parties arguing over a pot of money. This isn't "whales" versus "national security," it's "I want the money" versus "I want the money." Freezing orders create a zero-sum game: the only way to give a benefit to one party is to work an equal injury to the other.

Courts cannot come up with a solution that minimizes the amount of harm their decisions will inflict, they can only choose which party ought to bear the burden. For this, there is a bright-line rule: where equities are equal, the law will prevail. Pre-judgment, a court will not interfere with clearly established legal rights unless the plaintiff demonstrates that the loss it will suffer without the protection of preliminary relief far exceeds the harm the injunction would do to the plaintiff.

Interpreted most charitably, the government has alleged an injury that, in monetary terms, is

identical to the loss it asks the court to impose on Luis. Adding in a more substantive analysis that looks beyond financial terms to the consequences to each party, the inequity of the injunction is obvious. In relative terms, the potential pecuniary injury claimed by the government is insignificant. Without the injunction, it may have a slightly harder time recovering an amount of money that (1) would not come anywhere near to compensating it for the loss it claims, and (2) is essentially a rounding error on Medicare's daily budget.

Compare that with the impact the injunction has on Luis's day-to-day life. She cannot to pay for a lawyer to defend her against multiple felony charges. She cannot put any of her assets to a productive use. As long as this order remains in place, Sila Luis is incapable of engaging in even the most basic commercial transactions. She is legally prohibited from alienating or disposing of any property that comes into her possession. Prisoners, who are still allowed to earn money and make purchases from a commissary, have more economic freedom than Sila Luis, who has yet to be arraigned. Even if that doesn't violate her constitutional rights, it certainly constitutes a burden exponentially greater than any loss the government would suffer in the absence of this injunction.

D. Grossly Unfair Injunctions Are Not "in the Public Interest"

The government has never seriously tried to justify this injunction on the basis of a legitimate proprietary interest or a fear of irreparable injury. Its only argument in this case—and too many others to count—is that these obviously punitive, grossly

disproportionate and inherently inequitable restraining orders "are in the public interest." This is wrong on many levels, but entirely consistent with the government's insistence that it be afforded preferential treatment.

The solicitor general's *amicus* brief in *Grupo Mexicano* is instructive. The government first argued that the Court need not fear the consequences of approving statutory pre-judgment freezing orders because "even where the prerequisites for relief are met, the decision whether or not to issue a preliminary injunction, and on what terms, rests in the sound discretion of the district court." Brief of the United States in support of Respondents at 14, *Grupo Mexicano*, 527 U.S. 308 (1998). It went on to argue that the protection afforded by preserving courts' discretion should only obtain in cases between private parties and urged the Court to exclude the government from any adverse ruling because

> the federal government often seeks various forms of monetary relief through civil actions, and that the ability to obtain prejudgment orders preventing defendants from dissipating or secreting assets is therefore important to the effective enforcement of federal law. Whatever the outcome of this case with regard to the private parties involved, we respectfully request that the Court take account of the important public interest in the availability of prejudgment orders in government litigation.

Id. at 27. This Court declined to create a "government injunction" exception, but the government keeps insisting that one exists.

The government's argument rests on a fundamental misunderstanding of the significance of "the public interest" as a factor to be considered under *Winter*. Save when prosecuting public nuisances, the amorphous "public interest" is not an independent basis which can justify the grant of an injunction. 1 Story § 14. Even then injunctions issue "only in cases where the fact is clearly made out upon determinate and satisfactory evidence. For if the evidence be conflicting, and the injury to the public, that alone will constitute a ground for withholding this extraordinary interposition." 2 Story § 924a.

Outside nuisance cases. "public interest" serves as a restriction on the grant of preliminary relief. Because Equity will not lend itself to work an injustice, "if it appears that an injunction would be against public policy, the court properly may refuse to be made an instrument for such a result." *Beasley v. Texas & Pacific R. Co.*, 191 U.S. 492, 498 (1903). That is not an argument that works the other way around: "a court of equity, which, in its discretion, may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest...would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer," the public interest may cause equity to deny discretionary protection, but it will not compel it to enact a discretionary harm. *Pennsylvania v. Williams* 294 U.S. 176, 185 (1935).

But if the "public's interest" in this case *is* considered, it favors dissolving the injunction, or, at the very least, modifying it to release assets to pay for counsel. The only demonstrable interest the public has here is financial—but that interest is purely utilitarian. What matters to the taxpayers is the overall gain or loss to the government. Any moral interest in seeing that a guilty party makes restitution is, at most, a distant second.

Is this injunction in the economic interests of the public? Superficially, yes, to the extent that it might make it easier to recover $2,000,000 of public funds. But that speculative gain has to be weighed against its costs. The most obvious costs are those associated with the government's efforts to obtain and defend the injunction. Assuming the injunction is a net gain for the public, refusing to release funds to pay counsel is still indefensible. As the district court noted, restraining Luis's assets would not deprive her of assistance of counsel because, if she's unable to pay counsel, the court would assign counsel. That lawyer would ultimately be paid with public money. The fees for a felony charge are normally capped at $10,000, but, given the complexity of this case and the estimated trial length of 15 days, a waiver would certainly be granted. Is it better for the taxpayers to foot the bill for a public defender, or is it better to let Luis pay for her own lawyer with assets that might then be unavailable to satisfy judgment?

Assuming comparable amounts would be spent, allowing Luis to pay for her own counsel costs the public nothing and minimizes the Treasury's exposure. The worst case scenario is where Luis is represented at public expense and wins: the

government not only doesn't recover any of the money Medicare lost, it is also stuck with her legal bill. The best case scenario is where Luis pays her lawyer and loses: the government still gets a large judgment—which becomes a non-dischargeable lien—and has no out-of-pocket expenses.

CONCLUSION

All of this assumes that the government is acting rationally, is genuinely motivated by concern for the best interests of the common taxpayer, and is not using the § 1345 proceeding as a questionable litigation tactic meant to take advantage of liberal civil discovery procedures and to pressure Luis into a plea-bargain—as her co-indictees did.

In that case, *amici* do not suggest that the Court should let the world perish, but just this once: *Fiat justitia, et pereat Medicare.* This Court should reverse the Eleventh Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE*, NATIONAL ASSOCIATION OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the pretrial restraint of forfeitable substitute assets allegedly needed to retain counsel of choice violates the Fifth or Sixth Amendments?

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INTEREST OF AMICI CURIAE[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments (CSG) is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), amici curiae certifies that counsel of record for both petitioner and respondent have, after timely notification, consented to this filing in letters on file with the Clerk's office.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

The issue presented in this case involves the constitutionality of laws that permit forfeiture of substitute assets. Amici's interest in this issue stems from the involvement of many state and local

governmental entities in law enforcement including under state statutes providing for the forfeiture of substitute assets. Amici have identified numerous forfeiture laws which would be overturned by a ruling in favor of Petitioner Luis in this case.

State legislatures have enacted forfeiture laws to deter those engaged in criminal enterprises such as health care fraud, drug dealing, money laundering, theft related to motor vehicles, racketeering, tax evasion, smuggling, and other crimes. This achieves the purpose of deterrence since criminals understand that regardless of their punishment, they must forfeit the assets they acquire through their criminal enterprise. Like the statute at issue in *Luis v. United States*, forfeiture laws, which are primarily a creature of statute, were enacted by state and local legislatures to deal with highly sophisticated criminals engaged in complex and well-funded criminal enterprises. Forfeiture furthers the important governmental purpose of assuring that forfeitable assets are available at the conclusion of the trial, and are not hidden or dissipated. Forfeiture helps to ensure that those involved in criminal enterprises do not retain the benefits of their illicit conduct. Many states consider forfeiture to be a vitally important tool in deterring criminal activity and providing for reparation of the victims injured by the criminal conduct.

SUMMARY OF THE ARGUMENT

Petitioner seeks a broad constitutional ruling from this Court reversing the Eleventh Circuit decision and holding that the injunction prohibiting her from using assets violates the Sixth Amendment, is not authorized under a proper interpretation of 18 U.S.C. § 1345, and

was not issued using procedural safeguards adequate to satisfy Due Process. A ruling in favor of the Petitioner will result in a massive unwarranted preemption of validly-enacted state laws and would create an artificial distinction in the law between directly forfeitable property and substitute assets which can be forfeited when directly forfeitable assets are hidden or can't be reached by the jurisdiction. This would be particularly problematic because the state and local governments, with their varied forfeiture systems, provide a laboratory of options that can be used to fight increasingly sophisticated and often international criminal enterprises.

A broad constitutionally-based rule threatens to render these varied laws unconstitutional in whole or in part. Moreover, the Court's decision may impede efforts to consider various potential reforms to forfeiture by substituting a single-constitutionally-based rule. *Federal Asset Forfeiture: Uses and Reforms, Hearing,* February 11, 2015, p. 26 (describing efforts by four national law enforcement organizations, the Major Cities Chiefs Association (MCCA), Major County Sheriffs' Association (MCSA), International Association of Chiefs of Police (IACP), and the National Sheriffs' Association (NSA), to propose reforms to the current Attorney General).

Substitute assets are often made subject to forfeiture where a criminal has engaged in efforts at money laundering or hiding assets by commingling them with other money or hiding them in accounts outside the jurisdiction or other steps aimed at protecting them from being seized by the government as part of a criminal prosecution. Treating substitute

assets differently for constitutional purposes poses both practical and legal problems. It would impede state and local law enforcement efforts. And it would make efforts to obtain assets for compensation of victims or restitution much more difficult.

Probable cause provides a sufficient standard to safeguard the rights of those whose property is seized. As this Court has recognized, probable cause is sufficient to deprive persons of a liberty interest; certainly, it is therefore a sufficient standard to deprive someone of a property interest.

ARGUMENT

Striking Down 18 U.S.C. § 1345 On Constitutional Grounds Threatens To Overturn Numerous State And Local Forfeiture Laws, Undermine Law Enforcement Efforts Directed At Sophisticated Criminal Enterprises, And Elevate The Rights Of Those With Forfeitable Assets Above Rights Available To Other Criminal Defendants

A. State and local governments enact forfeiture laws as an important tool to fight sophisticated criminal enterprises and deprive criminals of their illicit gains

State asset forfeiture laws serve dual noble goals – to make victims of crime as whole as possible and to thwart criminals from profiting from their crimes. Sophisticated criminals today commingle funds particularly when involved in money laundering transactions. See e.g, *States v. Bornfield*, 145 F.3d 1123 (10th Cir. 1998); *United States v. Trost*, 152 F.3d 715

(7th Cir. 1998). The goal of forfeiture programs is first and foremost to deprive these criminals of the proceeds of their crimes, to disrupt and put an end to organized criminal syndicates and drug cartels, which use the proceeds of their criminal enterprises to continue their illegal activities, and to recover property that can be used to compensate victims and deter crime. This Court has recognized the "strong governmental interest in obtaining full recovery of all forfeitable assets." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 631; 109 S. Ct. 2646; 105 L. Ed. 2d 528 (1989).

Congress recently considered the enormous benefits to the public that stem from forfeiture efforts, and heard compelling testimony from the U.S. Department of Justice, state prosecuting attorneys, and others. One prosecutor explained that "[a]sset forfeiture is a tool used by state and local law enforcement and prosecutors to go after the pocketbooks of drug dealers and drug traffickers." *Federal Asset Forfeiture: Uses and Reforms, Hearing*, February 11, 2015, p. 24 (Testimony of Keith A. Henderson, Prosecuting Attorney, Floyd County, Indiana). He cautioned that "[n]ot having the ability, or reducing the ability to go after criminal proceeds ignores a huge component of sophisticated, modern transnational organized crime, particularly when it comes to money laundering operations." *Id.*

Well-financed and sophisticated drug cartels or criminal enterprises engaged in conspiracies to defraud the state or federal government in areas such as health care are not entitled to keep the fruits of their illegal conduct. A representative of the Department of Justice explained that "in my district, in Miami, when I was

both a State and Federal prosecutor, it wasn't that unusual to open the trunk of a car and find $50,000 to $100,000 of which no one knew who owned that money." *Federal Asset Forfeiture: Uses and Reforms, Hearing*, February 11, 2015, p. 93 (Testimony of Kenneth A. Blanco, Deputy Ass't Attorney General, United States Justice Dep't). In his view, forfeitures have been instrumental in handicapping the Zeta Cartel, for example, by making it "very difficult for their gatekeepers on the border to continue" because, without forfeited assets, the Cartel found it difficult to pay their people. *Federal Asset Forfeiture: Uses and Reforms, Hearing*, February 11, 2015, p. 93 (Testimony of Kenneth A. Blanco, Deputy Ass't Attorney General, United States Justice Dep't). Drug cartels and other highly sophisticated criminal enterprises work hard to hide assets, to commingle them so that they are untraceable, or to send them overseas where they are difficult to reach. See generally, Stefan D. Cassella, *Bulk Cash Smuggling and the Globalization of Crime: Overcoming Constitutional Challenges to Forfeiture Under 31 U.S.C. § 5332*, http:///scholarship.law.berkley.Edu/bjil/vol22/iss1/5, p. 99; HSBC admits failings after helping criminals hide assets, http://www.today/online.com/print/ 1056406. Adopting a rule to protect a criminal defendant's ability to access forfeited assets to pay for a criminal defense or any other purpose runs against the long history and tradition of forfeiture.

Removing the proceeds of crime from criminal enterprises is not only an appropriate deterrent, it enhances public security by disrupting criminal organizations that would otherwise continue to function. *Professional dealers are as astute as the*

prosecutors and lawyers. http://www.bucyrustelegraphforum.com/story/news/local/in-depth/2014/10/18/drug-dealers-know-laws-... Drug dealers take precautions to hide money – opening bank accounts in others' names to hold their drug sale earnings. *Id.* This makes the enforcement of forfeiture laws limited to assets directly traceable to criminal activity much more difficult to enforce. Hiding assets internationally is an unfortunate but real aspect of criminal conduct today. Recently, a Swiss bank was ordered to forfeit $15 million in a U.S. tax case after it had allegedly helped wealthy Americans hide millions of dollars in secret accounts abroad. Chad Bray, *Swiss Bank Ordered to Forfeit $16 Million in U.S. Tax Case*, The Wall Street Journal, April 24, 2012, http://www.wsj.com/articles/SB. Congressional findings specifically note that "smuggling currency in the form of 'bulk cash' is a favored device of drug traffickers, money launderers, tax evaders, and persons financing terrorist operations, and that it 'is the equivalent of, and creates the same harm as, the smuggling of goods.'" Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses*, 7 Buff. Crim. L. Rev. 583, 606 (2004) quoting "Findings" included as section 371 of Pub. L. No. 107-56, 115 Stat. 272, 337 (2001).

Alabama's statute exemplifies the provisions allowing forfeiture for substitute assets when the assets traceable to the crime have been deliberately hidden or commingled or moved outside the jurisdiction. The statute provides for the forfeiture of "any property owned or possessed by a person" when property that is subject to forfeiture "(1) cannot be located upon the exercise of due diligence, (2) has been

transferred or sold to, or deposited with, a third party, (3) has been placed beyond the jurisdiction of the court, (4) has been substantially diminished in value or, (5) has been commingled with other property which cannot be divided without difficulty, and such person knowingly participated as a principal, aider and abettor, or conspirator in the acts subjecting the property to forfeiture...." Ala. Code § 13A-12-200.8(f).

Similarly, Florida's statute makes contraband any personal property, including money or securities, "in the possession of or belonging to any person who takes aquaculture products in violation of s.812.014(2)(c)." Fla. Stat. Ann. § 932.701(2009). Florida also specifically allows forfeiture "up to the value of any property subject to foreclosure" if it "(a) Cannot be located; (b) Has been transferred to, sold to, or deposited with, a third party; (c) Has been placed beyond the jurisdiction of the court; (d) Has been substantially diminished in value by any act or omission of the person in possession of the property; or (e) Has been commingled with any property which cannot be divided without difficulty." *Id.* at (5).

As these statutes clearly show, the state intent is to address criminal activity perpetrated on innocent victims by requiring offenders to assist in making those victims whole through asset forfeiture. Where offenders try to hide the profits of their illicit activities such that those assets cannot be found, states have enacted laws to assist victims in becoming whole by permitting forfeiture for substitute assets.

Establishing a broad constitutional rule will have the deleterious effect of inhibiting the states from protecting their citizens from sophisticated criminal

activity where fruits of the crimes are hidden or missing. It will also quash state efforts to create sound policies and regulations surrounding asset forfeiture. See generally, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, __ U.S. ___, 135 S. Ct. 2652, 2673; 192 L. Ed. 2d 704 (2015) (recognizing need to defer to states so that they may perform their role as laboratories for finding solutions to pressing legal problems). The "statutory language in state forfeiture laws varies widely across the country." *Federal Asset Forfeiture: Uses and Reforms, Hearing*, February 11, 2015, p. 25. The Center for Problem-Oriented Policing said that "there are literally hundreds of federal and state forfeiture laws, and such laws continue to be enacted at near record levels." *Asset Forfeiture: Response Guide No. 7*, John L. Worrall (2008).

By grounding its decision on non-constitutional grounds, or adopting a narrow constitutional rule, the Court protects this sphere of state and local decision-making from being eroded by a constitutionally-based rule or series of rules that will usurp the ability of the state and local governments to adopt forfeiture programs that meet their unique needs. To be sure, deference to state and local governments cannot block enforcement of constitutional rights. But deference to just such legislative efforts has long been a hallmark of our federalism and should be appropriately part of the decision-making in this case.

B. No justification exists for treating substitute assets that are subject to forfeiture differently than other assets

Contrary to Petitioner's argument, it makes no practical or legal sense to treat substitute assets differently than other forfeitable assets. Substitute assets may be subject to forfeiture under federal and state laws. State and local legislatures have enacted various provisions designed to prevent criminals from evading the forfeiture law by converting or commingling assets in a way that makes it hard to trace or by hiding assets or by shipping them outside the jurisdiction. Legislation providing for forfeiture of so-called untainted assets is intended to aid in law enforcement, to deprive criminal enterprises of the funds they need to continue, and to gain possession of funds or property that can be used to compensate the victims of crime.

Making a distinction that is not found in the statute will undermine the legislative structure for enforcing the laws. *United States v. McGauley*, 279 F.3d 62, 71 (2nd Cir. 2002) is illustrative of situations in which the key distinction in the law may not rest on whether the specific funds were traceable to the fraudulent conduct. In *McGauley*, the Second Circuit held that commingled funds are subject to forfeiture when tainted funds are commingled with "legitimate funds" because commingling of them is enough "if the commingling was done for the purpose of concealing the nature or source of the tainted funds (that is, if commingling was done to facilitate money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i))." A judicial decision distinguishing between the source of the funds will

undermine this legislative effort to prevent money laundering.

Moreover, a judicial distinction based on the source of the funds will hamper law enforcement on a practical level. News accounts reveal concerns from those engaged in law enforcement over the difficulties that can arise in trying to enforce the laws, including forfeiture laws, against increasingly sophisticated criminal enterprises and the practical need for forfeiture of substitute or non-tainted assets. Unlike the pickpocket on the street or the person engaged in petty theft, drug dealers may open a bank account in other people's names to hold their drug sale earnings or keep a sports car in someone else's name and then use a rental car for the criminal conduct, all to avoid forfeiture. *Drug Dealers know laws, work around them*, Kristina Smith, October 18, 2014, http://bucyrustelegraphforum.com/story/news/local/in-depth/2014. Criminals may hide assets off-shore using code names and numbers. Chad Bray, *Swiss Bank Ordered to Forfeit $16 Million in U.S. Tax Case*, *supra*.

Sophisticated criminals know about the forfeiture laws; if the distinction proposed here is adopted, they will simply commingle or dissipate stolen or illegally-gotten gains so that they can retain the use of other funds when the government seeks to obtain restitution for funds they obtained by fraud or embezzlement or other illegal conduct. See generally, Cassella, *Bulk Cash*, *supra*. The funds circulating as part of this money laundering provide enormous gains to criminal enterprises. Dan Olson, *Hiding a 'mountain of cash'*, Minnesota Public Radio, http://www.news.minnesota.publicradio.ord/features/200107/03_olsond

_moneylaundering/. And the failure to freeze them would allow them to be dissipated or hidden. Thus, the distinction is properly rejected.

C. Allowing the freezing of substitute assets after a finding of probable cause provides the appropriate standard to protect the rights of those with assets potentially subject to forfeiture while also ensuring that they remain available

The constitutional right to counsel is not violated by the denial of access to assets that are subject to foreclosure under federal or state law as long as there is probable cause to believe that the seized assets are subject to forfeiture. This Court has concluded that property (forfeitable assets) may be seized upon a finding of probable cause in three separate decisions. *Kaley v. United States*, __ U.S. ___, 134 S. Ct. 1090, 188 L. Ed. 2d 46 (2014); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989); *United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989).

Despite the factual assertion that a defendant will sometimes be unable to retain the attorney of his choice without using assets that have been frozen because they are subject to forfeiture, no constitutional violation occurs if the assets are frozen based on a finding of probable cause. 491 U.S. at 615; 109 S. Ct. 2657. It is well-settled that the government may restrain persons based on a finding of probable cause to believe that they have committed a serious offense. 491 U.S. at 615-616; 109 S. Ct. 2657. It logically follows that "[i]f the Government may, post-trial, forbid use of forfeited assets to pay an attorney, then surely no

constitutional violation occurs when, after probable cause is adequately established, the Government obtains an order barring a defendant from frustrating that end by dissipating his assets prior to trial." *Id.* The probable cause finding of a grand jury is sufficient to restrain a criminal defendant for trial or place her in custody; it should work in the same way for purposes of freezing property. *Kaley*, 134 S. Ct. at 1098-1099; 188 L. Ed. 2d 46. In other words, the probable cause finding that allows the government to put a defendant on trial or place him in custody is sufficient to allow for the seizure or freezing of forfeitable assets. *Id.* at 1100; 188 L. Ed. 2d 46. That reasoning controls here as well and supports a ruling upholding the government's position.

CONCLUSION

For the foregoing reasons, the Court should squarely reject Petitioner's argument that the seizure of forfeitable assets violates the Constitution regardless of whether it means that the defendant will be unable to retain the lawyer of his or her choice so long as there has been a probable cause finding.

Respectfully submitted,

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RECORD AND BRIEFS

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SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 250 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited by this Court or by concurring or dissenting justices in cases such as *Kaley v. United States*, 134 S.Ct. 1090, 1104, 1112 (2014) (opinion of the Court and Roberts, C.J., dissenting), *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

NYCDL has long advocated for the recognition of due process rights where the government restrains funds necessary for those accused of crime to retain counsel. More than 25 years ago, when this Court first addressed the constitutionality of pretrial restraints, NYCDL submitted an *amicus* brief urging this Court to

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[1] This brief is filed with the written consent of the parties. Pursuant to Sup. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

require a pretrial, adversarial hearing at which the defendant could challenge the basis for any such restraints. *See* Brief of the Committees on Criminal Advocacy, and Criminal Law of the Association of the Bar of the City of New York, et al. as Amici Curiae in Support of Respondent, *United States v. Monsanto*, 491 U.S. 600 (1989) (No. 88-454). The NYCDL also submitted an *amicus* brief two terms ago when this Court returned to the same issue in *Kaley*. Brief of New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner, *Kaley v. United States*, 134 S.Ct. 1090 (2014) (No. 12-464).

SUMMARY OF ARGUMENT

We understand that one of the principal issues before the Court is whether the government, in anticipation of pursuing criminal charges, may restrain funds and property of a criminal defendant not traceable in any way to criminal activity and thereby prevent the defendant from using such resources to retain counsel of his or her choice in the criminal proceedings to follow. From our perspective, the use of such restraints represents a bold new development in criminal procedure – one that threatens to diminish the role of the private bar in shaping the criminal justice system and in contributing to the development of criminal law, one that threatens traditional constitutional principles, and one that makes criminal defense work very difficult if not impossible as a practical matter.

It has long been accepted that the government may restrain tainted assets – assets allegedly connected to criminal activity – at the outset of criminal proceedings. It is far different to suggest that

untainted assets – clean funds and property, not alleged to be connected to any crime – may be removed from and denied to a defendant who depends on them to obtain representation to contest criminal charges. Restraining a defendant's otherwise available and legitimate resources in this manner is in direct derogation of the Sixth Amendment's guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. If permitted in this case, the government will enjoy the power to pursue similar restraints in a wide range of other federal criminal cases. Regardless of whether the government employs that power broadly or selectively, it will limit the role and effectiveness of the criminal defense bar and create numerous obstacles burdening the work of the practitioner. The result will be to the detriment not only of individuals accused of crime, but of the general public which depends on a strong defense bar as a bulwark of liberty to ensure the integrity of the criminal justice system. Our traditional constitutional understanding – that individuals can and must use their own private funds to pay for their defense – would be replaced by one which generally assumes that the defense function will be subsidized by public funds made available to court-appointed lawyers.

ARGUMENT

I. Restraint Of Legitimate Assets Will Impede The Role And Effectiveness Of The Criminal Defense Bar

Section 1345 of Title 18, the statutory provision the government relies upon to justify pretrial restraint of untainted assets, applies in a broad range of federal criminal cases. By its terms, it can be invoked in almost any case said to involve a financial institution or a health care insurer or provider. 18 U.S.C. § 1345(a)(2) (permitting civil forfeiture in any case involving "a banking law violation (as defined in [18 U.S.C. § 3322(d)]), or a Federal health care offense"). The Department of Justice describes the statute as generally applying to "fraud-type cases." *Asset Forfeiture Policy Manual* (2013), p. 171 n.14. Federal fraud cases often concern conduct spanning considerable time periods, financial complexities, and thousands of documents and computer records offered as evidence. Their defense requires the assistance of counsel with considerable experience and substantial resources.

Though a tool used by the government in criminal cases, the restraints available in Section 1345 depend for their implementation on the commencement of parallel civil proceedings. 18 U.S.C. § 1345(a)(2). It is often observed that federal prosecutors prefer the civil mechanisms of Section 1345 to the more complicated and limited avenues for pretrial restraint offered by the criminal forfeiture statutes. *See* David Smith, *Prosecution and Defense of Forfeiture Cases*, ¶ 14.02A, Restraining Orders and Injunctions Under 18 U.S.C. § 1345(a)(2) (observing that the government "frequently

obtains an injunction or a restraining order under 18 U.S.C. § 1345(a)(2)" because it is a "powerful statute [that] affords the government important advantages in comparison with the restraining order provisions of the criminal forfeiture statutes").

By diverting a criminal case to a civil courtroom, Section 1345 has immediate consequences for the individual accused of crime seeking to use his or her own legitimate funds to hire a lawyer. For starters, major steps can be taken behind closed doors without the knowledge of the defendant. In the present case against Ms. Luis, for example, the government filed its civil complaint under seal along with an *ex parte* motion seeking a temporary restraining order. The defendant had no knowledge of or role in the proceedings, and a restraining order was issued before she could make any challenge. *See* Pet'r's Br. at 6. Although civil defendants generally enjoy the right to challenge a temporary restraining order at a subsequent preliminary injunction hearing, in a sense it is already too late: their assets having been restrained at the prior *ex parte* proceeding, they lack access to funds needed to pay for legal representation at any subsequent hearing. Few lawyers will jump in to challenge restraints aggressively when there can be no promise that they will be paid. Moreover, while defendants have a constitutional right to counsel in criminal proceedings, they do not enjoy the same right in civil proceedings and thus are often forced to contest a preliminary injunction on a *pro se* basis.

It should be emphasized that, in seeking such restraints, the government often has the option of freezing *all* of a defendants' assets, even where a

defendant is alleged to have had only a limited role in the crime, and even where such assets are far in excess of the proceeds the defendant is alleged to have obtained from the crime. In conspiracy offenses of the type covered by Section 1345, each defendant can be held responsible for and required to forfeit not only the amount he or she is alleged to have personally obtained from the crime, but the entire amount allegedly obtained by the conspiracy as a whole. *See, e.g.*, *United States v. Contorinis*, 692 F.3d 136, 147 (2d Cir. 2012).[2] In short, when the government restrains untainted assets, it is not limited to an amount which serves as a proxy for a defendant's ill-gotten gains, as is the case when it restrains only tainted assets. Instead, the government has the discretion to seek to restrain the maximum forfeitable amount associated with the crime.

When under such restraints at the outset of a case, individuals accused of crime are seldom in a position to pay for an experienced lawyer or to retain counsel of their choice. As a practical matter, criminal defense attorneys require funds to represent their clients and collect their fees from their clients' untainted assets. Few lawyers can afford to work for free. Restraint of untainted assets generally means that an individual accused of crime will have limited if any options from

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[2] Indeed, in some Circuits, defendants may be jointly liable for purposes of forfeiture for losses that were not reasonably foreseeable to them. *See United States v. Browne*, 505 F.3d 1229, 1277-80 (11th Cir. 2007) (forfeiture not subject to same test of reasonable foreseeability as substantive liability for acts of co-conspirators); *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005) (suggesting, but stopping short of instituting, such a rule).

among the private bar. The significance of this fact cannot be overstated. As Chief Justice Roberts observed, "An individual facing serious criminal charges brought by the United States has little but the Constitution and his attorney standing between him and prison. He might readily give all he owns to defend himself." *Kaley*, 134 S. Ct. at 1105 (Roberts, C.J., dissenting). Beyond the individual, all citizens benefit from a robust and independent criminal defense bar as a check on government power and a protector of constitutional rights.

The ability to restrain untainted assets gives the government great leverage in criminal cases. It can exercise its discretion in determining when to seek such restraints and in determining the amount of assets to put under restraint. In cases where it has the authority to seek broad restraints, it holds the power to financially cripple a defendant from the outset, depriving him or her of the means to hire any lawyer at all. In other cases, even where the government chooses not to seek to restrain all of a defendant's assets, it essentially holds the power to determine the size of the budget the defendant will have available, during the pending legal proceedings, to cover living expenses for herself and her family and to pay for legal services. There might well be cases where the government is more inclined to release funds because a defendant has indicated a willingness to plead guilty or a willingness to cooperate against his co-defendants. *See* William Genego, *The New Adversary*, 54 Brooklyn L. Rev. 781, 812-813 (1988) (survey reporting that attorneys had elected not to take certain cases because of concerns about the application of forfeiture statutes to attorneys' fees, and reporting that plea bargains had been offered

that would exempt attorneys' fees from forfeiture with the understanding that, absent a plea, such fees would be forfeited). The integrity of the private bar is undermined to the extent that lawyers need to negotiate with the government in order to receive payment for their services.

By limiting a defendant's financial resources, the government limits his or her choice of counsel and the type of defense that can be prepared. A defendant with limited resources may be inclined to hire a lawyer with less experience if the price is right. A defendant with limited resources may be less inclined to pay for a "trial lawyer" and more inclined to hire a "deal-maker" even where a case might otherwise be defensible. Lawyers retained on limited budgets tend to have more limited options than lawyers who have full access to their client's untainted resources. In financial fraud cases brought by the Department of Justice, it is not uncommon for voluminous documents and entire computer systems to be seized, including reams of data that must be reviewed as potential evidence. Lawyers often require staff to help review these materials. Such staff is difficult to obtain with only limited funds. Lawyers also often rely on investigators to find and interview potential witnesses. Investigators are difficult to hire when funds are low.

The result is a shift in the concept of what it means to retain a lawyer of one's choice. Traditional Sixth Amendment jurisprudence champions the right of the individual to retain a lawyer of his or her choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006) (Sixth Amendment commands "that the accused be defended by the counsel he believes to be best");

Wheat v. United States, 486 U.S. 153, 159 (1988) (Sixth Amendment protections include "the right to select and be represented by one's preferred attorney"); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("[A] defendant should be afforded a fair opportunity to secure counsel of his own choice."). The government's broad discretion in determining whether and to what extent to seek to restrain a defendant's untainted assets, on the other hand, effectively places a large part of that choice in the hands of the government, because it controls the purse strings.

Notably, before Andrew Weissmann, Chief of the Fraud Section of the Department of Justice's Criminal Division, held his current position, he remarked in public testimony before the House of Representatives that the "long tradition and jurisprudence of pre-conviction asset restraint and forfeiture are grounded exclusively in the recognition that the funds to be seized are 'tainted.'" He observed that "[t]his requirement has cabined prosecutorial discretion by limiting the universe of restrainable funds to those traceable to the crime committed." He further observed that a departure from this requirement carries with it "enormous potential for abuse." *Prosecutorial Authority to "Preserve Assets" for Restitution: Hearing on Legislative Proposals to Amend Federal Restitution Laws Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 47-48 (2008) (prepared statement of Andrew Weissmann, Partner, Jenner & Block LLP).

II. Limiting The Role Of The Private Bar In Criminal Cases Would Alter A Longstanding Constitutional Paradigm

Throughout most of this nation's history, individuals accused of crime have had no choice but to rely on their own private resources to fund their defense. The Sixth Amendment right to counsel was historically premised on the assumption that individuals would use their own untainted assets to fulfill this constitutional right. *See* Pet'r's Br. at 24-25. Public funding of defense lawyers was a relatively late phenomenon in our constitutional jurisprudence, arising only in the twentieth century. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)). To the extent a public criminal defense bar has been developed, comprised mainly of federal public defender organizations and court-appointed lawyers, it was never intended as a resource for individuals with extensive untainted assets. Rather, such programs were seen as necessary to safeguard the Sixth Amendment rights of indigent defendants who lacked financial means. *See Gideon*, 372 U.S. at 344 (guaranteeing right to counsel for "poor man charged with crime"); 18 U.S.C. § 3006A(a) (mandating plans in each district to provide counsel for persons "financially unable to obtain adequate representation"); *About Us*, Federal Defenders of New York (August 19, 2015, 2:33 PM), http://federaldefendersny.org/about-us/ (describing Federal Defenders of New York as "dedicated solely to defending poor people accused of federal crimes").

Today, when the government restrains the untainted assets of persons with financial means, it

appears to do so on the assumption that there is a public safety net for the provision of legal services. This assumption is consistent neither with the Sixth Amendment's historic commitment to a right to privately funded counsel, nor with the intended purpose of a publicly-subsidized criminal defense bar. Many federal public defender organizations and lawyers appointed under the Criminal Justice Act serve numerous clients and have only limited resources. Requiring them to represent defendants in large financial fraud cases – often requiring the review and analysis of extensive data and documents – puts a burden on their ability to represent their larger client base. Although one way to address this issue would be to increase funding for federal public defender organizations and court-appointed lawyers in order to accommodate such cases, such funds would ultimately have to come from tax dollars, with the general public paying an increased share of the cost of criminal defense. One can debate whether this makes good policy. For present purposes, it suffices to note that the broad use of restraints under Section 1345, effectively removing private assets from the pool of resources that can be used to support the defense of criminal cases, presages a fundamental change in the way that legal services have traditionally been delivered within the criminal justice system.

CONCLUSION

To the extent that pretrial restraint of untainted assets deprives criminal defendants of counsel of their choice, it diminishes the role of the private defense bar in federal criminal cases, where they have traditionally served as an independent voice of important

constitutional rights. At the same time, the use of such restraints increases the power and leverage of prosecutors in a way that impedes the delivery of legal services to those accused of crime.

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In The Supreme Court of the United States

SILA LUIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in *pro bono* legal representation for individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues.

The Rutherford Institute is interested in this case because it is committed to ensuring the continued vitality of the Sixth Amendment's core guarantee to a criminal defendant's counsel of choice and believes that the Government's abusive forfeiture tactics seriously undermine this right.

SUMMARY OF THE ARGUMENT

The Government brought a civil action under 18 U.S.C. § 1345 to freeze Petitioner's assets, including assets entirely unrelated to her alleged crime and which were legitimately obtained. In this

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

amicus brief, the Institute focuses on how the drafters of the Constitution understood civil forfeitures and its relationship to a criminal defendant's Sixth Amendment right to choose counsel. That history demonstrates that the Founding Fathers would have viewed the seizure here—of a person's untainted and legitimate assets—a constitutional anathema.

First, the Government's seizure of legitimate, untainted assets is akin to the *in personam* forfeitures the Founding Fathers rejected in Article III of the Constitution. The First Congress banned these forfeitures because they were unduly harsh and unnecessary, and prohibited them for all federal crimes.

Second, the forfeiture at issue here is inconsistent with the Founding Fathers' understanding of the Sixth Amendment right to counsel. When Congress ratified that Amendment, the country recognized only a right to counsel that a defendant could afford. Though the courts later expanded the Sixth Amendment to include the right to appointed counsel, *see, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963), this expansion did not subvert the original intent of the Founding Fathers. Allowing the Government to execute a pretrial seizure of legitimate and untainted funds undermines that basic right by denying Petitioner her right to a counsel she could afford had the Government not seized her legitimate assets.

ARGUMENT

The Government asks this Court to endorse an abusive practice the Founders explicitly rejected and which contradicts their understanding of the limited seizures the Government could undertake prior to a finding of guilt. In so doing, the forfeiture improperly undermines Petitioner's Sixth Amendment right to counsel of her choosing.

I. The Founders Explicitly Rejected Forfeiture of Untainted Assets

The Government advocates for an *in personam* civil forfeiture: one based on the defendant's potential liability rather than on any taint attributable to the seized funds themselves. But the Constitution explicitly bans *in personam* forfeitures for treason, and the First Congress explicitly prohibited such forfeitures for all federal crimes.

Forfeiture is "[t]he loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty." *Black's Law Dictionary* 765 (10th ed. 2014). Civil forfeiture,[2] the process the Government used here to deprive Petitioner of her *untainted* assets, has been understood as a "proceeding brought by the government against property that either facilitated a crime or was

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[2] By contrast, criminal forfeiture is "[a] governmental proceeding brought against a person to seize property as punishment for the person's criminal behavior." *Black's Law Dictionary* 765 (10th ed. 2014).

acquired as a result of criminal activity." *See id.*; *see also* David J. Taube, *Civil Forfeiture*, 30 Am. Crim. L. Rev. 1025, 1025 (1993).

Historically, England recognized three types of forfeitures: (1) deodand (the forfeiture of property that caused the death of a subject of the Crown), (2) forfeiture after conviction for a felony or treason, and (3) statutory forfeiture of certain offending property. *See Austin v. United States*, 509 U.S. 602, 611 (1993); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-83 (1974).

A. *In Rem* Forfeitures

Like the seizure of *tainted* assets this Court approved in *Kaley v. United States*, 134 S. Ct. 1090 (2014), English *in rem* forfeitures—including deodand and statutory forfeiture—centered on the character of the offending property, such as assets that the defendant had used in violation of the customs and revenues laws. *See Calero-Toledo*, 416 U.S. at 681-82; *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137-38 (1943).[3]

This sort of *in rem* forfeiture took root in the United States, *see Austin*, 509 U.S. at 613, based on

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[3] For example, violation of the Navigation Acts of 1660 (which required the shipping of most commodities via English vessels) resulted in a forfeiture of the offending goods and the vessel transporting them. *See, e.g.*, *Austin*, 509 U.S. at 612.

"the fiction that the action was directed against 'guilty property,' rather than against the offender himself." *United States v. Bajakajian*, 524 U.S. 321, 330 (1998). Though the Founding Fathers considered *in rem* forfeitures as necessary "to guard the revenue laws from abuse,"[4] early American forfeiture statutes sharply limited the scope of the forfeiture to the offending cargo or the transporting ship. Reed, *supra*, at 258.[5]

B. *In Personam* Forfeitures

Unlike *in rem* forfeitures based on the tainted nature of the seized assets themselves, the forfeiture at issue here is *in personam*, *i.e.*, it is based on Petitioner's potential liability if convicted of Medicare fraud.

When the Founders drafted the Constitution, English law recognized forfeitures after conviction for a felony or treason based on the individual's adjudicated guilt rather than on the property's taint. *See The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827)

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[4] Terrance G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. Sch. L. Rev. 255, 257-58 (1994) (internal quotation marks and citation omitted).

[5] Subsequent statutes involved the seizure and forfeiture of distilleries and related property used in the course of defrauding the United States of tax revenues from alcoholic beverages sales. *United States v. 92 Buena Vista Ave., Rumson, N.J.*, 507 U.S. 111, 120 (1993) (plurality).

(Story, J.). Indeed, English law historically defined "felony" as "an offense which occasions a total forfeiture of either lands or goods or both." *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir. 1980).

When a defendant was convicted of a felony or treason, his "blood was corrupted" so that nothing could pass to the next generation by inheritance. 1 J. Bishop, *New Commentaries on the Criminal Law* 585 (8th ed. 1892) ("When a man has committed against the community a wrong so flagrant as to unfit him to be a member of it, the corruption of blood isolates him, so that he cannot exercise the rights violated; and the forfeiture puts back what the community had given him.").[6]

In personam forfeitures served to punish felons and traitors for violating the law and was rooted in the belief that these individuals did not deserve to own property. *Austin*, 509 U.S. at 612; *cf. The Palmyra*, 25 U.S. at 14 ("It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of consequence "). These

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[6] *See Calero-Toledo*, 416 U.S. at 682 ("The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property.").

forfeitures issued only after an adjudication of guilt. *See The Palmyra*, 25 U.S. at 14 ("[N]o right to the goods and chattels of the felon could be acquired by the crown by the mere commission of the offence; but the right attached only by the conviction of the offender.").[7]

Public opinion in early America condemned these forfeitures as unduly harsh, especially given the effect on innocent relatives. *See* Bishop, *supra*, at 585; J. Kent, *Commentaries on American Law* 385 (5th ed. 1844) ("[T]he tendency of public opinion has been to condemn forfeiture of property, at least in cases of felony, as being an unnecessary and hard punishment of the felon's posterity.").

Crucially, the Founding Fathers ***rejected*** the English tradition of *in personam* forfeitures: the Constitution explicitly banned forfeitures for treason. U.S. Const. art. III, § 3, cl. 2 ("The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attainted."). And the First Congress abolished *in personam* forfeitures for all federal crimes. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 117 ("[N]o conviction or judgment shall

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[7] *See also id.* ("The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right by producing the record of the judgment of conviction.").

work corruption of blood, or any forfeiture of estate
"); *see* Bishop, *supra*, at 585-86. Congress reenacted this ban several times.[8]

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[8] *See* Rev. Stat. § 5326 (1875); Act of Mar. 4, 1909, ch. 321, § 341, 35 Stat. 1159; Act of June 25, 1948, ch. 645, § 3563, 62 Stat. 837, codified at 18 U.S.C. § 3563 (1982 ed.); repealed effective Nov. 1, 1987, Pub. L. 98-473, 98 Stat. 1987.

Congress departed from its strict ban on *in personam* forfeitures only once before 1970. The Confiscation Act of 1862 authorized the seizure of Confederate soldiers' property. *See* Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589. But the Act was adopted against the Civil War backdrop, and even then, was limited to soldiers' life estates. *See generally Bigelow v. Forrest*, 76 U.S. 339 (1869) (strictly construing the act); *Miller v. United States*, 78 U.S. 268 (1870) (upholding the act under Congress's war powers).

In 1970, Congress resurrected the *in personam* forfeiture penalty for select organized crime and major drug trafficking offenses. *See* Organized Crime Control Act of 1970, 18 U.S.C. § 1963, and Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 848(a). But Congress adopted this novel approach because earlier attempts to combat organized crime were not successful. *Alexander v. United States*, 509 U.S. 544, 561-62 (1993) (Kennedy, J., dissenting). Congress therefore determined that "an attack must be made on their source of economic power itself, and the attack must take place on all available fronts." S. Rep. No. 91-617, at 79 (1969). In doing so, Congress acknowledged that they

In choosing to adopt the English tradition of *in rem* forfeitures but to reject those based on *in personam* liability, the Founding Fathers plainly rejected the seizure of entirely untainted assets at issue in this case. The seizure at issue here, like the *in personam* forfeitures the Founding Fathers rejected, is "an unnecessary and hard punishment of the felon's posterity," Kent, *supra*, at 385, especially since the Government imposed the forfeiture even before an adjudication whether Petitioner is or is not a felon.

II. The Forfeiture Here Improperly Undermines the Historic Sixth Amendment Right to Counsel That a Criminal Defendant Could Afford

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. amend. VI.

The idea that a court could prevent a defendant from using his own untainted assets to retain counsel is belied by the historical development of the Sixth Amendment. England historically prohibited counsel for criminal defendants in serious

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were departing from centuries of precedent: "[C]riminal forfeiture represents an innovative attempt to call on our common law heritage to meet an essentially modern problem." *Id.*

criminal cases.[9] 1 F Pollock & F. Maitland, *The History of English Law* 211 (2d ed. 1898). English lawmakers perceived this prohibition as necessary to maintain peace and order. *See* J. Tomkovicz, *The Right to the Assistance of Counsel* 3-4 (2002). Moreover, the common law did not subscribe to a presumption of innocence, and the assistance of counsel was perceived as an impediment to efficient prosecution and punishment. *Id.* at 4.

Against this backdrop, the Founders of this country began to reject England's common law rule even before ratification of the Sixth Amendment. *See Holden v. Hardy*, 169 U.S. 366, 386 (1898) ("Even before the adoption of the constitution, much had been done towards mitigating the severity of the common law, particularly in the administration of its criminal branch. [T]o the credit of her American colonies, let it be said that so oppressive a doctrine [denying the assistance of counsel] had never obtained a foothold there."). Most colonies enacted early statutes that recognized a right to counsel of choice. *See* Beaney, *supra*, at 14-18, 25. After the Revolution, many states enacted similar constitutional provisions "intended to do away with

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[9] This practice began to slowly change before the American Revolution, but did not include the right to retain counsel in all cases. W. Beaney, *The Right to Counsel in American Courts* 8-11 (1955).

the rules that denied representation, in whole or in part, by counsel in criminal prosecutions." *Betts v. Brady*, 316 U.S. 455, 466 (1942); *see also* Beaney, *supra*, at 18-22, 25.

When Congress ratified the Sixth Amendment, they understood the constitutional right to counsel as the right to counsel a defendant could afford to retain. This was evident because the right to appointed counsel had not yet been recognized as fundamental in all criminal cases. *See generally Gideon*, 372 U.S. 335 (overruling *Betts*).[10]

Congress's contemporaneous actions confirm this original understanding. ***First***, Congress enacted a law just before the passage of the Sixth Amendment, providing that in federal court, "the parties may plead and manage their own causes personally or by the assistance of such counsel or

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[10] In the last half century, the Sixth Amendment has been expanded to encompass a right to appointed counsel for indigent defendants. *Cf. Powell v. Alabama*, 287 U.S. 45, 71 (1932) ("[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law "); *Johnson v. Zerbst*, 304 U.S. 458, 468-69 (1938) (requiring appointment of counsel for all federal criminal defendants who could not afford a lawyer); *Gideon*, 372 U.S. at 344-45 (extending a criminal defendant's federal constitutional right to counsel to state court).

attorneys at law as by the rules of the said court shall be permitted to manage and conduct causes therein." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73; *see* Beaney, *supra*, at 27-28. ***Second***, several months before the Sixth Amendment was ratified, Congress enacted legislation to permit "[e]very person who is indicted of treason or other capital crime [ ] be allowed to make his full defense by counsel learned in the law." Act of Apr. 30, 1790, ch. 9, 1 Stat. 118. The Act further provided that upon the defendant's request, the court must immediately "assign to him counsel." *Id.* This limited statutory right to appointed counsel would have been superfluous if the Sixth Amendment right to counsel already included this guarantee. *See* Tomkovicz, *supra*, at 20.

The forfeiture at issue here is fundamentally inconsistent with the Founding Fathers' understanding that criminal defendants had a right to choose any counsel they could afford. By depriving Petitioner of legitimate and untainted funds, the forfeiture prevents her from securing chosen counsel by making it impossible for her to pay that counsel.

The Sixth Amendment has always encompassed the core right of securing one's counsel of choice at one's own expense. In fact, it was the only understanding at the time it was ratified. The idea that the government could trample on this fundamental right with a tool that was despised by

the Founders is inconceivable. The historical context cuts directly against the Government's position in this case.

CONCLUSION

For the reasons set forth above, the decision below should be reversed.

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